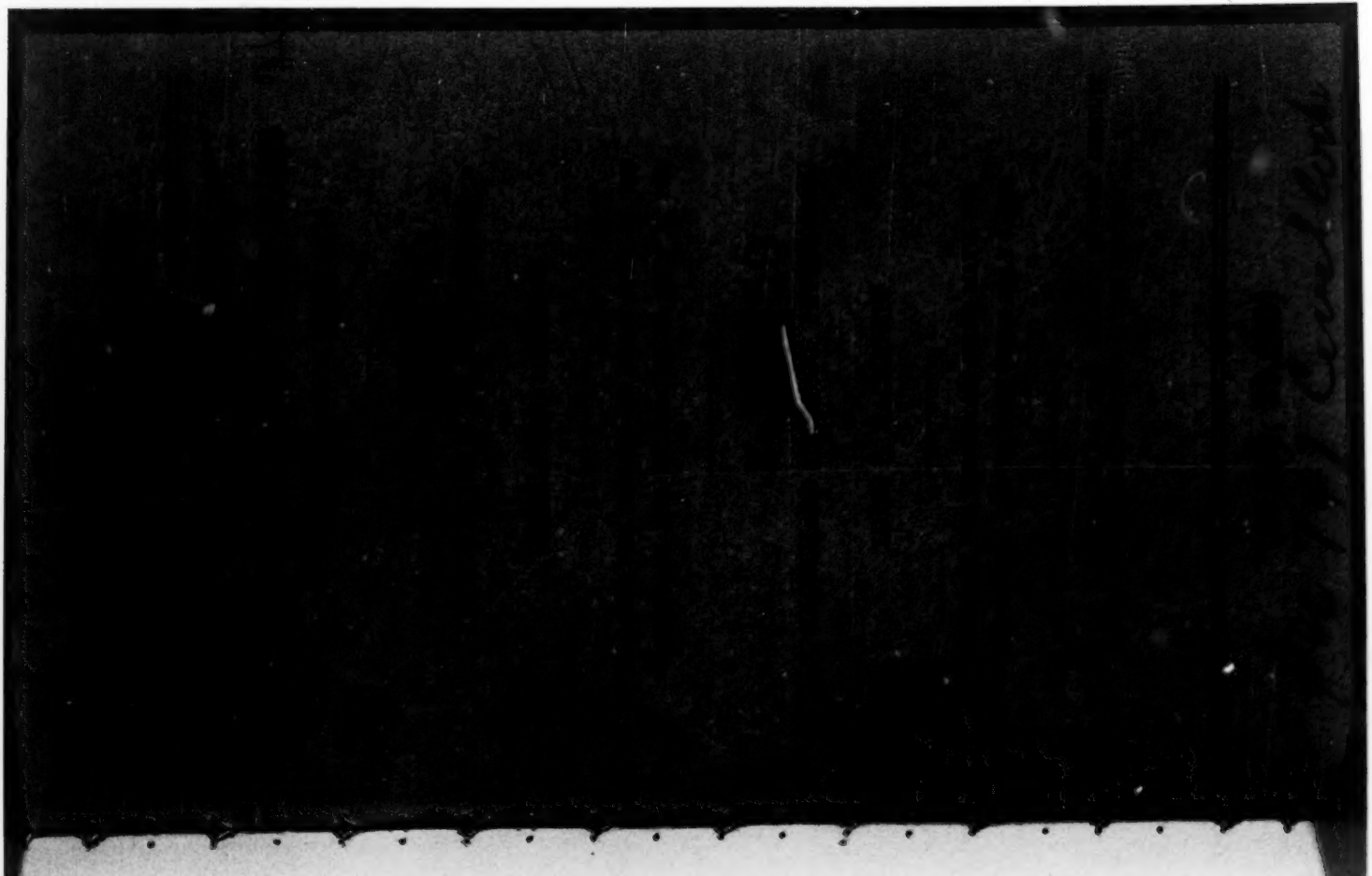

(29,591, 29,602)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 316

LOUIS B. MACKENZIE, PETITIONER,

vs.

A. ENGELHARD & SONS CO.

No. 321

A. ENGELHARD & SONS CO., PETITIONER,

vs.

LOUIS B. MACKENZIE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1923

[fol. 1] [Caption omitted]

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE

No. 58

LOUIS B. MACKENZIE, Plaintiff,

vs.

A. ENGELHARD & SONS COMPANY, Defendant

PETITION IN EQUITY—Filed July 3, 1919

The plaintiff, Louis B. Mackenzie, says:

1. The plaintiff, Louis B. Mackenzie (hereafter called Mackenzie), is a citizen of the State of Illinois and is an inhabitant of the Eastern Division of the Northern District of Illinois, and resides in the City of Chicago in that State; and the defendant A. Engelhard & Sons Company (hereafter called Engelhard Co.) is a corporation created, organized and existing under the laws of the State of Kentucky, is a citizen of the State of Kentucky, and is an inhabitant of the Western District of Kentucky, and has its residence and principal place of business in Louisville in that State.

[fol. 2] 2. This is a suit of a civil nature in equity and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000) Dollars, and it is between citizens of different States.

3. By a promissory note dated July 25, 1911, which they signed, executed and delivered, F. W. R. Eschmann and E. A. Eschmann agreed and promised to pay on or before 30 days after said date to E. F. Dunstan or order, Seventy Five Hundred ($7,500) Dollars, with interest at the rate of 6 per cent per annum, and as collateral security for the payment of said notes pledged thereon a certificate of stock No. 24 for 130 shares of the capital stock of the defendant herein, Engelhard Co. By proper endorsement the said note and the said collateral were assigned and delivered to and became the property of the plaintiff, Louis B. Mackenzie.

4. On March 10, 1913, Mackenzie filed suit No. 78411 at Louisville, Ky., in the Jefferson Circuit Court, Chancery Branch, Second Division (a Court of general equity jurisdiction), entitled Louis B. Mackenzie v. F. W. R. Eschmann, seeking to recover judgment upon the said note and to secure the payment thereof and the enforce-

ment of the lien upon the said pledged stock, in which suit F. W. R. Eschmann entered his appearance, and such proceedings were had therein that a judgment was rendered by the lower court on October 31, 1914, dismissing the petition and requiring Mackenzie to surrender to Eschmann the said certificate for 130 shares of stock pledged as collateral security on the note and in pursuance to such judgment Mackenzie did so surrender the said certificate to Eschmann.

5. Mackenzie appealed from the judgment to the Court of Appeals of Kentucky, and such proceedings were had therein that the judgment was reversed pursuant to an opinion delivered March 6, 1917, entitled Mackenzie v. Eschmann's executors, 174 Ky. 450 (Eschmann having died pending the appeal and the suit having been revived in the Court of Appeals against his executors (who entered their appearance therein), and the case was remanded to the lower court with directions to enter a judgment in conformity with that opinion. In pursuance to such mandate, the Jefferson Circuit Court did on October 31, 1917, enter a final judgment, a copy whereof is filed herewith as part hereof, marked "Exhibit 1," wherein, among other things, it was ordered, adjudged and decreed that the former judgment of October 31, 1914, be vacated, set aside and held for naught; that Mackenzie should recover of the estate of Eschmann [fol. 3] and from Eschman's executors, the sum of Seventy Five Hundred ($7,500) Dollars with interest at the rate of 6 per cent from June 25, 1911, and the further sum of $29.60 costs; that Mackenzie had a lien upon the said certificate No. 24 for 130 shares of the capital stock of the Engelhard Co., and upon any certificate or certificates which may have been or may thereafter be issued by the Engelhard Co. to Eschmann's executors in lieu of the said original certificate, and that Mackenzie has a lien upon the 130 shares of stock in the Engelhard Co. to secure the payment of the judgment therein rendered; that to satisfy the plaintiff's judgment the said 130 shares of stock should be sold at public auction by the Commissioner of said Court, free of all liens, and that the proceeds of such sale should be first applied to the satisfaction of Mackenzie's judgment, interest and costs; and that the Executors of said Eschmann, to wit; Edgar A. Eschmann and Bettina F. Eschmann should return to the Court the said certificate No. 24 for the 130 shares of stock in the Engelhard Co.

Eschmann's executors did not return to the Court the said certificate.

6. Pursuant to that decree, the Commissioner of the Jefferson Court on July 15, 1918, offered the said 130 shares of stock for sale at public auction to the highest and best bidder at the Court House door in Louisville, Jefferson County, Ky.; and one R. A. McDowell, an attorney at law, who had as such attorney represented Eschmann, Eschmann's Executors and the Engelhard Co. in said suit both in the lower court and in the Court of Appeals, appeared at the sale and stated to the assembled bidders that the certificate No. 24 for the 130 shares of stock referred to in the Court's judgment

and advertisement of sale, had been cancelled, as the stock had been sold by Eschmann during his lifetime, and that there was no stock in the Engelhard Co. standing in the name of Eschmann's Executors or either of them, and that the said certificate No. 24 was not then in existence, having been cancelled in the life-time of Eschmann; and thereby dissuaded persons from bidding at the said sale, and Mackenzie was the highest and best bidder and became the purchaser of the said stock.

The Commissioner of the Jefferson Circuit Court reported the sale to the Jefferson Circuit Court and such proceedings were further had therein that the report of sale was confirmed on Oct. 30, 1918, and the Commissioner was ordered to execute and deliver to Mackenzie a bill of sale evidencing the purchase by Mackenzie of said [fol. 4] 130 shares of stock; and in pursuance thereto, a bill of sale dated December 7, 1918, a copy of which is filed herewith as part hereof, marked "Exhibit 2," was signed, executed and delivered by the Commissioner of the Jefferson Circuit Court, examined and approved by the said Court and the Judge thereof, and delivered to Mackenzie, selling, assigning and transferring to Mackenzie, the said 130 shares of the capital stock of A. Englehard & Co. theretofore described by and evidenced by said certificate No. 124, or by any certificate or certificates which may have been or may thereafter be issued by the Engelhard Co. to Eschmann's Executors in lien of the original.

The said judgment, orders and other proceedings in the Jefferson Circuit Court have never been modified, appealed from, or superseded, and have always been and still are in full force and effect.

7. On or about December 10, 1912, and before the filing of the original suit by Mackenzie against Eschmann in the Jefferson Circuit Court, Mackenzie notified the Engelhard Co. that Mackenzie held said certificate No. 24 as pledgee to secure the payment of said Seventy Five Hundred ($7,500) Dollars note; and the Engelhard Co. was made a party defendant to the suit in the Jefferson Circuit Court and was fully advised of Mackenzie's title and claim to the said stock and the certificate therefor, and was kept so advised throughout the progress of the litigation both in the lower court and in the Court of Appeals.

Eschmann's executors did not return to the Jefferson Circuit Court the said certificate No. 24; and on April 29, 1919, Mackenzie delivered to the defendant, Engelhard Co., a certified copy of the said bill of sale executed by the Commissioner of the Jefferson Circuit Court, and demanded that the Engelhard Co. deliver to Mackenzie the said certificate No. 24, or a new certificate for 130 shares of the capital stock of the Engelhard Co., but the Engelhard Co. refused to deliver to Mackenzie the said original certificate No. 24 or any certificate for 130 shares of the capital stock of the Engelhard Co. or any stock thereof.

The Engelhard Co. now has, and for many years heretofore has had a large and prosperous business in Kentucky, and the 130 shares of stock thereof is worth at least $13,000. Mackenzie is now and

always has been since the entry of the final decree affirming the said judicial sale, the owner of said certificate No. 24 and the 130 shares of stock represented thereby.

[fol. 5] Wherefore the plaintiff, Louis B. Mackenzie prays as follows, to wit:

1. That the defendant A. Englehard & Sons Co. be ordered adjudged and decre-d forthwith to deliver to the plaintiff, Mackenzie, a certificate made out in the name of Louis B. Mackenzie certifying that he is the owner of 130 shares of the capital stock of the A. Engelhard & Sons Co.

2. Or in the event that the said stock has been re-issued by A. Engelhard & Sons Co. to some other person and therefore a new certificate cannot lawfully be issued to the plaintiff, then and in such event that the Court shall ascertain the value of the said stock and order, adjudge and decree that the defendant, A. Engelhard & Sons Co. pay to the plaintiff, Louis B. Mackenzie the value of the stock as so ascertained with the amount of the dividends, if any, declared thereon since July 15, 1918.

3. For its costs herein expended and all general and proper relief.

May it please your honors to grant unto the plaintiff a writ of subpœna to be directed to the said A. Engelhard & Sons Co., the defendant hereinbefore named, requiring and commanding it to appear herein and answer, but not under oath, answer under oath being hereby expressly waived, the several allegations in this petition contained.

Bruce and Bullitt, King, Brower & Hurlburt, Counsel for Plaintiff.

[For convenience the following Exhibits filed with the petition are not printed at this point, but are printed in chronological order with other Exhibits at page 26, infra.

Exhibit 1. Final Judgment of the Jefferson Circuit Court entered Oct. 31, 1917 (p. 36, infra).

Exhibit 2. Bill of Sale executed December 7, 1918, by the Commissioner of the Jefferson Circuit Court, pursuant to said Final Judgment (p. 38, infra).]

[fol. 6] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed July 23, 1919

Come- the defendant, A. Engelhard & Sons Company by counsel and moves the Court to dismiss the petition of the plaintiff, Louis B. Mackenzie, because the facts therein stated are not sufficient to constitute a valid cause of action in equity.

R. A. McDowell, Attorney for Defendant.

In United States District Court

Opinion on Motion to Dismiss—Filed May 27, 1920

The requisite diversity of citizenship existing and the amount in controversy exceeding the sum or value of $3,000 exclusive of interest and costs, this suit was brought by the plaintiff upon allegations of fact in his bill substantially as follows:

In July 1911 F. W. R. Eschmann and E. A. Eschmann, by their note payable thirty days after date, promised to pay to E. F. Dunstan or order $7,500 with interest, and as security for the payment of the note pledged Certificate No. 24 for 130 shares of the capital stock of the defendant. This certificate by proper endorsement was thereupon assigned and delivered to the plaintiff.

On March 10, 1913, plaintiff filed an action in the Jefferson Circuit Court against F. W. R. Eschmann seeking to recover judgment upon the note and the enforcement of the lien upon the pledged stock. Eschmann entered his appearance in that suit and such proceedings were had that a judgment was rendered on October 31, 1914, dismissing the plaintiff's petition and requiring plaintiff to surrender to Eschmann the certificate of stock so pledged to plaintiff. Pursuant to that judgment Mackenzie did surrender the certificate to Eschmann.

Plaintiff, however, appealed from that judgment to the Court of [fol. 7] Appeals, and that court, in March 1917, reversed the judgment of the Jefferson Circuit Court, and remanded the case to the latter court with directions to enter a judgment in conformity with the opinion of the Court of Appeals. Pursuant to that mandate the Circuit Court did, on October 31, 1917, enter a final judgment as directed. By that judgment plaintiff recovered from Eschmann's executors (Eschmann having died) the sum of $75,000 evidenced by the note sue- on, together with interest thereon and costs.

Pursuant to the ruling of the Court of Appeals the Jefferson Circuit Court also adjudged that plaintiff had a lien upon said Certificate No. 24 for 130 shares of the capital stock of the defendant, and also upon any certificate or certificates which might have been or might thereafter be issued by the defendant to Eschmann's executors in lieu of the original certificate and a lien upon said 130 shares of stock to secure the payment of the amount adjudged.

The judgment of the Jefferson Circuit Court also directed that to enforce said judgment and to satisfy the plaintiff's lien the 130 shares of stock should be sold at public auction by the proper officer of the court free of all liens, and that the proceeds of the sale should be applied to the satisfaction of the plaintiff's judgment, interest and costs, and further required the executor of Eschmann to return to the court the said Certificate No. 24 for the 130 shares of stock in defendant company. This return Eschmann's executors did not make.

Pursuant to the judgment of the Jefferson Circuit Court the proper officer offered the 130 shares of stock for sale at public auction in

due course. When this was done, R. A. McDowell, the attorney for Eschmann, stated to the Bidders assembled that Certificate No. 24 for the 130 shares of stock referred to in the judgment and advertisement of sale had been cancelled, as the stock had been sold by Eschmann during his lifetime, that there was no stock in the Engelhard Company in the name of Eschmann or his executors, and that Certificate No. 24 was not then in existence, having been cancelled. He thereupon forbade bidders to bid at the sale, and plaintiff under those circumstances became the purchaser of the right to the 130 shares of stock which had been pledged for the security of the indebtedness to him. Mr. McDowell does not appear to have stated who then held the 130 shares, and certainly did not state that the defendant did not control it, nor that the defendant, who knew all about the facts pertaining to the previous litigation, did not have [fol. 8] perfect knowledge and notice of all that had been done with that stock.

A report of the sale was made to the Jefferson Circuit Court. This report was confirmed by the Court, and a bill of sale for the 130 shares, under the judgment of the court, was executed by its commissioner and delivered by him to the plaintiff.

In December 1912, and before the filing of the original suit, plaintiff notified the defendant, Engelhard Company, that he held Certificate No. 24 as the pledgee to secure the payment of said debt due him, and furthermore the Engelhard Company was made a defendant in the suit in the Jefferson Circuit Court, and thereby was kept perfectly advised of all the proceedings therein.

The bill of complaint then avers that Eschmann's executors did not return to the Jefferson Circuit Court said Certificate No. 24; that on April 29, 1919, plaintiff delivered to the defendant Engelhard Company a certified copy of the bill of sale executed by the Commissioner of the Jefferson Circuit Court, and demanded that the defendant deliver to the plaintiff said Certificate No. 24 or a new certificate for 130 shares of the capital stock of the defendant, but that it refused to deliver to the plaintiff either said original Certificate No. 24 or any certificate covering any part of the capital stock of the defendant.

The allegations of the bill being taken as true, careful consideration of the arguments of defendant's counsel has not enabled us to see why some account of what has been done with the 130 shares of stock should not be given by an answer to the Bill. Prima facie the plaintiff has suffered a wrongful deprivation of his stock, and this could not have occurred without the co-operative action of the defendant in issuing a later certificate with full knowledge of the plaintiff's superior rights. Defendant knew not only of the pledge to plaintiff but of the judgment of reversal whereby that stock was determined by the judgment of the Court of Appeals to belong to the plaintiff as pledgee. Besides it was adjudged to be sold to pay the debt for which it was pledged.

True it is that under compulsion of the judgment of the Jefferson Circuit Court the certificate of stock was surrendered to Eschmann, but the effect of all that, as defendant must have known, was

most probably undone by the judgment of the Court of Appeals, under which the real title to the stock remained in plaintiff, as defendant must also have known or at all events is chargeable with sufficient knowledge to put it upon its guard. Indeed it would seem that the defendant must have issued to some one else a certificate for [fol. 9] the 130 shares. It might have thus become liable to the plaintiff unless some lawful defense of its conduct in respect to such issuing of the stock can be established.

Respecting the defendant's argument in support of the motion to dismiss it may suffice to say, first, that while Mr. McDowell's statement at the Commissioner's sale might have given notice to outsiders, it in no possible way adversely affected the rights of the plaintiff. Second, that no certificate for the stock was ever issued to the plaintiff is not a fact which in any way would relieve defendant from any liability to the plaintiff. The failure to issue the stock, indeed, may be the principal factor in establishing the plaintiff's claim. Third, the court finds itself unable to yield to the argument that the Jefferson Circuit Court and the Court of Appeals of Kentucky did not have jurisdiction over the subject-matter of the action when those courts respectively rendered their judgments.

At all events, without feeling the necessity of going into more detail, the court is clearly of opinion that the bill of complaint requires an answer, and that the motion to dismiss it should be and it is overruled.

Walter Evans, Judge. May 27, 1920.

In United States District Court

Answer—Filed June 2, 1920

The defendant, A. Engelhard & Sons Company, for answer to plaintiff's bill of complaint, denies the allegation in the third paragraph that certificate No. 24 for 130 shares of the capital stock of this defendant was endorsed and assigned to the plaintiff, Louis B. Mackenzie.

Defendant denies that the judgment of the Jefferson Circuit Court was entered pursuant to the opinion of the Court of Appeals of Kentucky insofar as it granted a lien to the plaintiff, Mackenzie, [fol. 10] and denies that the Court of Appeals of Kentucky directed the Jefferson Circuit Court to enter a judgment granting a lien to said Mackenzie as alleged in Paragraph 5 of said bill. Defendant denies that the Commissioner of the Jefferson Circuit Court offered the said 130 shares of stock for sale on July 15th, 1918.

Defendant says that the statements alleged in Paragraph 6 of said bill as having been made by R. A. McDowell at the alleged sale on July 15th, 1918, were true, and that the certificate No. 24 for 130 shares of stock referred to in the Court's judgment had been cancelled, and that the stock had been sold by F. W. R. Eschmann during his lifetime, and that there was no stock in the Engelhard

Company standing in the name of Eschmann's Executors or either of them, and that the said certificate No. 24 was not then in existence, and that it had been cancelled in the lifetime of said Eschmann, and defendant says that no certificate was theretofore or thereafter issued to the Executors of F. W. R. Eschmann or either of them by the defendant company, for stock therein.

Defendant, A. Engelhard & Sons Company, says that it was made a party defendant to the suit in the Jefferson Circuit Court as alleged by plaintiff in Paragraph 7 of his bill, but that immediately thereafter the Court sustained his demurrer to plaintiff's petition and dismissed this defendant as a party to said suit, and that the defendant was not thereafter a party in any action either in the Jefferson Circuit Court, or the Court of Appeals of Kentucky with reference to said stock.

Paragraph II. Further answering the bill of complaint by the plaintiff herein, the defendant, A. Engelhard & Sons Company, says that the plaintiff, Louis B. Mackenzie on or about December 10th, 1912, and before said Mackenzie filed his original action in the Jefferson Circuit Court against F. W. R. Eschmann, presented to this defendant at its office, certificate No. 24 for 130 shares of stock of this defendant, and demanded that said stock be transferred to said Mackenzie. Defendant says that it declined to make such transfer because upon examination it found that said certificate No. 24 stood in the name of F. W. R. Eschmann, and said certificate which was presented by Mackenzie did not bear the endorsement and was not endorsed by the said F. W. R. Eschmann; that when the plaintiff, Mackenzie filed his said suit against F. W. R. Esch- [fol. 11] mann, he made this defendant a party defendant therein, but the Court dismissed the action insofar as this defendant was concerned.

Defendant says that later about November —, 1914, F. W. R. Eschmann presented said certicate No. 24 to the defendant herein and directed the defendant to issue a certificate for said 130 shares of stock in lieu of said certificate No. 24, as said Eschmann had sold his said stock. Upon examination of said certificate, the defendant found that the certificate was duly endorsed by F. W. R. Eschmann, and thereupon defendant cancelled certificate No. 24 and issued a new certificate as directed by said Eschmann; that since said November —, 1914, the said F. W. R. Eschmann had not been the holder or owner of any stock in defendant company; that said certificate No. 24 has not been in existence but was cancelled, and that no stock or certificate therefor was at any time issued to or in the name of the Executors of F. W. R. Eschmann or either of them, or in the name of F. W. R. Eschmann.

Defendant says that when the plaintiff Mackenzie on April 29th, 1919, demanded that the defendant deliver to said Mackenzie a certificate for 130 shares of the capital stock of said defendant company, that the said Mackenzie did not present to this defendant any certificate of stock in said defendant company to be transferred, but presented and tendered to the defendant a certified copy of a bill

of sale, which bill of sale or a copy thereof is filed with the plaintiff's bill of complaint purporting to convey to Louis B. Mackenzie 130 shares of stock "evidenced by certificate No. 24 or by any certificates or certificate which may have been or may hereatfer be issued by A. Engelhard & Sons Company to the defendants, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of certificates No. 24"; and defendant says that said certificate No 24 was not in existence, having been cancelled during the lifetime of F. W. R. Eschmann, and that no certificate had theretofore or has since been issued by A. Engelhard & Sons Company the defendant herein, to Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, or either of them, in lieu of said certificate No. 24 or at all, and said Louis B. Mackenzie knew at the time said facts were true.

Said Louis B. Mackenzie the plaintiff herein also knew that said 130 shares of stock of the defendant A. Engelhard & Sons Company was of the value of at least Thirteen Thousand ($13,000.00) Dollars, [fol. 12] as alleged in his bill of complaint, but because Mackenzie knew that certificate No. 24 had been cancelled and that no stock stood in the name of Eschmann's Executors, or either of them, the plaintiff Mackenzie bid at the Commissioner's sale One Hundred ($100.00) Dollars and no more, which was the only consideration as shown in the copy of the Commissioner's bill of sale filed as "Exhibit 2" with plaintiff's bill of complaint herein.

Defendant says that all of its capital stock has been issued and is outstanding and that no part thereof is issued to F. W. R. Eschmann, or his estate or anyone representing him or his estate, or for the benefit of him or his estate, and that said F. W. R. Eschmann, his estate, nor his Executors own any stock in the defendant A. Engelhand & Sons Company.

Defendant further says that by reason of the judgment entered by the Jefferson Circuit Court, pursuant to the opinion of the Court of Appeals of Kentucky, the plaintiff Mackenzie secured a judgment against Edgar A. Eschmann and Bettina E. Eschmann, as Executors of the estate of F. W. R. Eschmann, deceased, for the sum of Seven Thousand Five Hundred ($7,500.00) Dollars, being the amount of said note with interest from its date, and that the plaintiff, Mackenzie, has filed proof of his claim, the said judgment, with said Executors of the estate of said F. W. R. Eschmann, and that said estate has not yet been settled, and the claim of said Mackenzie is still pending against said estate.

Wherefore, having fully answered, the defendant prays that the plaintiff's bill be dismissed; for its costs herein expended, and for all proper relief.

R. A. McDowell, Attorney for Defendant.

[fol. 13] IN UNITED STATES DISTRICT COURT

MOTION—Filed Oct. 5, 1920

The plaintiff, Louis B. Mackenzie, moves the Court to strike out Paragraph Two of the defendant's answer herein, because the same is insufficient and does not state facts constituting a defense to the cause of action.

Wm. Marshall Bullitt, Attorney for the Plaintiff.

IN UNITED STATES DISTRICT COURT

OPINION ON MOTION TO DISMISS PARAGRAPH TWO OF THE ANSWER—Filed Oct. 11, 1920

In an opinion delivered in this case on a motion to dismiss the Bill we endeavored to state clearly the situation, or rather the facts, as they then appeared. This will save the need of any repetition of what was then stated. The defendant filed an answer in two paragraphs. The first denied many of the material allegations of the Bill and the second set up defendants affirmative defense. The plaintiff has moved to dismiss that paragraph of the Answer.

In disposing of this motion we can not say that our view is perfectly satisfactory to ourselves, but we give the benefit of the doubt to the defendant and against a dismissal without a trial on the merits of that particular phase of the case.

The defendant, speaking generally, says that the plaintiff, on or about December 10th, 1912, and before plaintiff filed his original action in the Jefferson Circuit Court against Eschman, presented to the defendant at its office Certificate No. 24 and demanded that the stock therein described be transferred to him, but that it was not done because the certificate was not endorsed by Eschman, the person named therein. It avers that later, about November 1914, Eschman presented said Certificate No. 24 to defendant and directed it to issue a certificate for the 130 shares in lieu of Certificate No. [fol. 14] 24, as said Eschman has sold his said stock, and that upon examination of said certificate the defendant found that it had been duly endorsed by Eschman, and thereupon defendant cancelled it and issued a new certificate as directed by Eschman, and that since November 1914 the said Eschman has not been the holder or owner of any stock in said company, and that said Certificate No. 24 since that date has not been in existence.

It will be observed that in this statement the defendant does not say to whom this certificate was issued nor who is now the holder of the shares. It may be a matter for consideration whether this is sufficiently definite, and whether or not the court under Equity Rule 20 should not, on its own motion, require it to be made more definite. However, for the present that will be passed over.

Other statements are made in the second paragraph which, if undenied, might more or less affect the equities of the case. In

this situation and in order that there may be a full and careful presentation of all the facts, the court is not disposed to sustain the motion to dismiss the 2nd paragraph.

Notwithstanding the court's doubts as at first expressed it is conceived to be better to have a full and thorough investigation of the facts to ascertain whether there is any equitable support to the defense set up in this paragraph. Of course in disposing of this motion we do not go back to the Bill of Complaint nor to the opinion referred to, as, upon this motion, they can not be permitted to be influential.

The judgment of the court will be that the motion to dismiss the second paragraph of the Bill should be and it is overruled.

Oct. 11th, 1920.

Walter Evans, Judge.

[fol. 15] IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed March 30, 1921

Paragraph One. Comes the defendant, A. Engelhard & Sons Company, and by leave of Court amends its answer herein, and for amendment to the first paragraph thereof, denies that it was advised that the plaintiff Mackenzie had any title to said stock or to the certificate therefor, and denies that it was kept so advised throughout the progress of the litigation either in the lower Court or in the Court of Appeals of Kentucky, or at all.

Paragraph Two. For amendment to Paragraph Two of its answer herein, the defendant substitutes this amendment for and in lieu of Paragraph Two of its original answer herein, and says that on or about December 10th, 1912, and before said Mackenzie had filed action #78,411 in the Jefferson Circuit Court, entitled Louis B. Mackenzie vs. F. W. R. Eschmann et al., the said Louis B. Mackenzie presented to this defendant at its office Certificate No. 24 for 130 shares of the capital stock of the defendant, A. Engelhard & Sons Company, standing in the name of F. W. R. Eschmann on the books of said Company, and demanded that said stock be transferred to said Mackenzie.

Defendant says that said Certificate No. 24 which was presented to this defendant by Mackenzie, was not endorsed by F. W. R. Eschmann in whose name it stood, and bore no endorsement of said F. W. R. Eschmann, and that no power of attorney authorizing such transfer, executed by said Eschmann was presented with said certificate and demand: that when the plaintiff Mackenzie filed his said suit #78,411 in the Jefferson Circuit Court against F. W. R. Eschmann et al., on March 10th, 1913, he made this defendant, A. Engelhard & Sons Company a party defendant therein, but upon demurrer filed by this defendant, the Jefferson Circuit Court dismissed the action on the 7th day of June, 1913, insofar as this defendant was concerned, and this defendant was never thereafter a party to said suit.

The defendant herein says that in said action #78,411 of Mackenzie vs. Eschmann et al., in the Jefferson Circuit Court, said Court entered a judgment on the 7th day of November, 1914, which is recorded in Judgment Book 37 page 509 of said Court, wherein it provided as follows, to-wit:

"It is further considered and adjudged that the defendant, F. W. [fol. 16] R. Eschmann be and he is hereby permitted to withdraw from the papers in the case, the certificate for 130 shares of the capital stock of A. Engelhard & Sons Company filed herein as an exhibit, leaving a copy thereof in the record."

A certified copy of said judgment is filed herewith, made a part hereof and marked "Exhibit Judgment."

The defendant, A. Engelhard & Sons Company says that the plaintiff, Louis B. Mackenzie did not supersede the said judgment, insofar as it permitted the defendant Eschmann to withdraw said certificate of stock from the papers in Court, and failed to execute a supersedeas bond with respect thereto.

Defendant says that pursuant to said judgment of the Court, the defendant, F. W. R. Eschmann did withdraw said certificate of stock from the papers on the— day of January, 1915.

Defendant says that later, on or about the 20th day of February, 1915, F. W. R. Eschmann presented said Certificate No. 24 for 130 shares of stock in this defendant corporation, to the defendant herein and directed the defendant to issue a certificate or certificates in lieu of said certificate No. 24 for 130 shares of said stock.

Defendant says that said certificate was accompanied by a power of attorney executed by said F. W. R. Eschmann, whereby this defendant was directed to transfer said stock, and thereupon this defendant cancelled said certificate No. 24, standing in the name of said F. W. R. Eschmann, and issued new certificates in lieu thereof as directed by said Eschmann; that since said transfer on the 20th day of February, 1915, the said F. W. R. Eschmann has not been the holder or owner of any stock in the defendant, A. Engelhard & Sons Company; that said Certificate No. 24 has not been in existence, but was at that time cancelled, and that no stock or certificate therefor was issued at that time or since to or in the name of Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, or either of them, or in the name of F. W. R. Eschmann, and that no stock has been owned or held by said F. W. R. Eschmann or by his executors or by anyone for him or on his account or for account of him or his estate.

Defendant says that at the time of said transfer of said Certificate No. 24 on the 20th day of February, 1915, as directed by said F. W. R. Eschmann, the plaintiff, Louis B. Mackenzie had not perfected an appeal to the Court of Appeals from the judgment entered in said action #78,411, but that after said transfer on the 20th day of [fol. 17] February, 1915, and in the month of April, 1915, the said Louis B. Mackenzie perfected an appeal from said judgment in the Court of Appeals of Kentucky, but failed to supersede said judgment from which he appealed and which permitted Eschmann to withdraw said certificate.

Defendant says that four years after said Certificate No. 24 had been withdrawn from the Court, pursuant to said judgment, and transferred as aforesaid, that the plaintiff, Louis B. Mackenzie on the 29th day of April, 1919, demanded that the defendant, A. Engelhard & Sons Company deliver to said Mackenzie, a certificate for 130 shares of the capital stock of said defendant; that said Mackenzie did not present to this defendant any certificate of stock in said defendant Company to be transferred to him, but presented and offered to this defendant a certified copy of a bill of sale, which bill of sale or copy thereof is filed with the plaintiff's bill of complaint marked "Exhibit No. 2," purporting to convey to Louis B. Mackenzie 130 shares of the capital stock of this defendant, and that said bill of sales recites as follows:

"The undersigned, Eustace L. Williams, Commissioner of the Jefferson Circuit Court, for and on behalf of the parties of the first part, do hereby convey to the second party hereto, Louis B. Mackenzie, the said 130 shares of the capital stock of A. Engelhard & Sons Company hereinabove described and evidence by Certificate No. 24 or by any certificate or certificates which may have been or may hereafter be issued by A. Engelhard & Sons Company to the defendants, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said Certificate No. 24."

Defendant says that it declined to issue any certificate to said Louis B. Mackenzie upon such demand, and informed said Mackenzie (and it was and is a fact), that said Certificate No. 24 was not then in existence; that it had been cancelled on February 25th, 1915, during the lifetime and upon the direction of F. W. R. Eschmann, the holder and owner thereof, and that no certificate had theretofore been issued by defendant, A. Engelhard & Sons Company to the said Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, or to either of them in lieu of said Certificate No. 24 or at all, and it says that no such certificate has been issued since.

[fol. 18] Defendant says that all of its capital stock which it is authorized by law to issue, has been issued and is outstanding, and had been issued and was outstanding at the time of said demand, and that no part thereof is issued to F. W. R. Eschmann or to his executors, or to his estate, or to anyone representing him or his estate, or for the benefit of him or his estate, and that neither F. W. R. Eschmann, his estate or his executors own any stock in the defendant, A. Engelhard & Sons Company, nor is any such stock held for the benefit of said Eschmann or his estate or his executors; that this defendant is not authorized by law or by its Charter to issue and cannot issue and could not issue at the time of said demand, any further certificate or certificates representing its capital stock.

Paragraph Three. Defendant, A. Engelhard & Sons Company, says that when stock Certificate No. 24 for 130 shares of the capital stock of said defendant, A. Engelhard & Sons Company was withdrawn from Court by the defendant, F. W. R. Eschmann, pursuant to said

judgment entered November 7th, 1914, in the Jefferson Circuit Court, in action #78,411, styled Mackenzie vs. Eschmann, which judgment is hereinabove filed with this answer, marked "Exhibit Judgment," which judgment was not superseded by the plaintiff; that said Court gave up the possession, custody and control of said stock and certificate, and released all possession, custody and control thereof to the defendant; that the said Court never thereafter acquired possession, custody or control of said stock or certificate, and that after the said judgment entered November 7th, 1914, was reversed by the Court of Appeals, and when the Jefferson Circuit Court entered its second judgment under date of October 31st, 1917, said Court had no jurisdiction of said stock or certificate, and said judgment insofar as it attempted to grant a lien on said stock, order a sale thereof and order a return of said certificate to Court was void and of no effect, because the subject matter thereof was not in the possession or under the control or jurisdiction of said Court, and was not subject to or affected by any order or judgment of said Court with reference thereto.

Defendant, A. Engelhard & Sons Company, says that it was not a party to said action in the Jefferson Circuit Court, #78,411, from and after June 7th, 1913, at which time said Court entered an order dismissing the petition of the plaintiff as against this defendant, and [fol. 19] it was not a party thereto when said judgment was entered on October 31st, 1917, which judgment is set up with plaintiff's petition or at the time of the Commissioner's sale thereunder or at any time after said June 7th, 1913, and this defendant had no right to object to or appeal from said judgment entered in said action #78,411 and was not bound thereby.

R. A. McDowell, Attorney for Defendant.

[For convenience "Exhibit Judgment" filed with the Amended Answer is not printed at this point but is printed in chronological order with the other Exhibits at p. 30, infra.

"Exhibit Judgment"—original judgment of the Jefferson Circuit Court entered November 7, 1914* (p. 30, infra).]

IN THE UNITED STATES DISTRICT COURT

STIPULATION OF AGREED FACTS—Filed March 30, 1921

For the purpose of avoiding the necessity of taking proof herein, it is agreed between the parties hereto as follows, to-wit:

1. Louis B. Mackenzie, is a citizen of and resides in the city of Chicago, County of Cook, and State of Illinois.

A. Englehard & Sons Company, is a corporation, created, organized and existing under the laws of the State of Kentucky; is a citizen of the State of Kentucky, and has its residence and principal place of business in Louisville, in that State.

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*Erroneously described in the petition and final judgment as having been entered Oct. 31, 1914.

The amount in controversy herein, is exclusive of interest and costs [fol. 20] of the value of more than Three Thousand ($3,000.00) Dollars.

In case the Court should enter a decree in favor of plaintiff, and the Court should find that the A. Engelhard & Sons Company has disabled itself from issuing to plaintiff any of the shares of stock claimed by complainant, further evidence shall be taken as to the value of such stock.

2. Louis B. Mackenzie, presented to A. Engelhard & Sons Company, on or about December 10th, 1912,

(a) Stock certificate #24 of the A. Engelhard & Sons Company, which certificate reads as follows:

"This certifies that F. W. R. Eschmann is entitled to 130 shares of the capital stock of A. Engelhard & Sons Company, transferable only in person or by attorney on the books of the company, upon the surrender and proper endorsement of this certificate."

which certificate bore no endorsement, and no power of attorney authorizing a transfer; together with,

(b) A promissory note dated July 25, 1911, signed, executed and delivered by F. W. R. Eschmann and E. A. Eschmann, wherein the said Eschmanns agreed and promised to pay $7,500.00 with interest at the rate of six per cent (6%) per annum, and which note recited that there was deposited therewith, as collateral security.

"Certificate of stock #24 for one hundred and thirty (130) shares of the capital stock of A. Engelhard & Sons Company."

3. Louis B. Mackenzie claimed that said note had become his property by endorsement and delivery of the note, together with the collateral therein described; and thereupon Louis B. Mackenzie demanded that A. Engelhard & Sons Company transfer the said 130 shares of stock, represented by said certificate, to Louis B. Mackenzie, as pledgee.

A. Engelhard & Sons Company declined to comply with Mackenzie's demand, and refused to transfer said stock as demanded by him.

4. On March 10th, 1913, Louis B. Mackenzie filed an action, #78,411, in the Jefferson Circuit Court, Kentucky, against F. W. R. Eschmann, A. Engelhard & Sons Company, et al., seeking to recover judgment upon said note, praying that he be adjudged a lien upon said stock, and praying for the enforcement of such lien against the said stock.

[fol. 21] 5. On June 7, 1913, the Jefferson Circuit Court sustained the demurrer of the defendant, A. Engelhard & Sons Company, to Mackenzie's petition, and dismissed the action in so far as said A. Engelhard & Sons Company was concerned, and A. Engelhard & Sons Company was never thereafter a party to said suit.

The Judge of the Jefferson Circuit Court, at the time he sustained said demurrer, and concurrently with the order sustaining the same, wrote upon the official wrapper containing said files, the following memorandum opinion:

"7th June, 1913.

Plaintiff alleges that he has possession of the certificate of stock; that it was delivered to him along with the note to secure which it was pledged. The note is in writing and is signed by the owner of the certificate of stock. In the body of the note is written the statement that the certificate is pledged. What more could be needed to make a pledge. Here is actual delivery of the certificate and a writing signed by the owner of the certificate and the fact that the shareholder did not write his name upon the certificate is of no importance in a court of equity. Plaintiff has a right to have his lien upon the certificate of stock enforced and he needs no attachment. His is a lien by contract. Engelhard & Sons Co. are not a party to the transaction and are unnecessary parties to the action. That corporation cannot be proceeded against until plaintiff becomes the owner of the certificate and a new certificate in his name is demanded by him and refused by Engelhard & Sons Co.

2. A. E. Eschmann has no interest in the property sought to be sold, is not served with process, and there is no attachment against his property if he has any in this jurisdiction.

General demurrer of Engelhard & Sons Co. sustained.

Special demurrer of E. A. Eschmann is sustained.

Special demurrer of F. W. R. Eschmann is overruled.

Kirby, J."

which has ever since remained in the files of this cause.

6. Such proceedings were had in said action #78411, in the Jefferson Circuit Court, that a judgment was entered on November 7, [fol. 22] 1914,* which is recorded in Judgment Book 37, Page 509, of said Court, and a true copy thereof is filed with the amended answer of the defendant herein, and a copy of the opinion of the lower Court rendered October 31, 1914 is filed herewith as part hereof.

Said judgment provided, in part, as follows:

"It is considered and adjudged by the Court, that the plaintiff recover nothing of the defendant, and that the petition of the plaintiff, Louis B. Mackenzie, be and it is hereby dismissed.

It is further considered and adjudged that the defendant, F. W. R. Eschmann, be and he is hereby permitted to withdraw from the papers in the case, the certificate for one hundred and thirty (130) shares of the capital stock of A. Engelhard & Sons Company filed herein as an exhibit, leaving a copy thereof in the record."

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*Inadvertently described in the petition herein and in the judgment of reversal as having been entered on October 31, 1914.

7. Louis B. Mackenzie, prayed an appeal to the Court of Appeals of Kentucky, but did not supersede said judgment in so far as it permitted Eschmann to withdraw said certificate of stock from the Court, and executed no supersedeas bond with reference thereto.

8. The defendant therein, F. W. R. Eschmann, withdrew said certificate of stock from the papers in said Court, on or about January, 1915, and said certificate of stock has never been returned into the custody or possession of the Court since said withdrawal.

9. On or about February 20, 1915, F. W. R. Eschmann presented said certificate #24 to the defendant, A. Engelhard & Sons Company, with a power of attorney for the transfer for the stock, which power of attorney had been executed by F. W. R. Eschmann; the said F. W. R. Eschmann directed A. Engelhard & Sons Company to issue new certificates therefor in lieu of said certificate #24 for 130 shares of said stock; and the defendant, A. Engelhard & Sons Company, did then and there physically mark "Cancelled" said certificate #24, and pursuant to Eschmann's directions, issued new certificates for 130 shares of stock in lieu thereof, as follows:

(a) To R. A. McDowell, in payment of his fee in said suit, 25 shares, which were later sold by McDowell for $2,500.00 cash, and transferred to V. H. Engelhard by R. A. McDowell. R. A. McDowell [fol. 23] was the attorney of record for the defendants, F. W. R. Eschmann, Edgar A. Eschmann and A. Engelhard & Sons Company, in cause #78,411, in the Jefferson Circuit Court, Kentucky, and on the appeal of said cause to the Court of Appeals of Kentucky, was attorney of record for Bettina E. Eschmann and Edgar A. Eschmann, as Executrix and Executor respectively, of the estate of F. W. R. Eschmann, deceased.

V. H. Engelhard was a brother of Mrs. F. W. R. Eschmann, and on December 10, 1912, and thereafter, until the date of his death, to-wit: (subsequent to the date of the transfer of the 25 shares of the capital stock of A. Engelhard & Sons Company from R. A. McDowell to said V. H. Engelhard), the President and the executive head of said A. Engelhard & Sons Company, and was the person on whom the demand mentioned in Paragraph 3, supra, was made on December 10, 1912.

(b) To Bettina E. Eschmann, 105 shares which stand on the books in her name to-day, (issued in two certificates, one for 40 shares and one for 6 shares.) Said Bettina E. Eschmann was, at the date of said transfer, the wife of F. W. R. Eschmann, and now is Executrix of the estate of F. W. R. Eschmann, deceased.

F. W. R. Eschmann and Bettina E. Eschmann were on December 10, 1912, husband and wife, living together as such, and so continued until the death of F. W. R. Eschmann which occurred on or about April 26th, 1915. The fact of said relationship to each other and living together of said F. W. R. Eschmann and Bettina E. Eschmann during the period aforesaid was known to V. H. Engelhard.

F. W. R. Eschmann nowhere recorded any transfer or assignment of said 105 shares of stock of A. Engelhard & Sons Company to Bettina E. Eschmann, except on the corporate books of A. Engelhard & Sons Company.

Since said transfers, no part of said 130 shares of said stock has stood or now stands in the name of F. W. R. Eschmann, or his Executors, or either of them as such.

10. On April 26th, 1915, Louis B. Mackenzie perfected an appeal to the Court of Appeals of Kentucky from said judgment entered in the Jefferson Circuit Court of Kentucky, without superseding said judgment.

Thereafter, the defendant, F. W. R. Eschmann, died on April 26th, 1915, and the action was revived by Louis B. Mackenzie in said Court of Appeals against Eschmann's Executors, Bettina E. Eschmann and Edgar A. Eschmann.

On March 6, 1917, the Court of Appeals of Kentucky reversed said judgment entered in the Jefferson Circuit Court, as is shown [fol. 24] by an opinion of said Court of Appeals of Kentucky, entitled Mackenzie vs. Eschmann's Executors, 174 Ky. 450 filed herewith and remanded said case to the said Jefferson Circuit Court.

11. On October 31, 1917, the said Jefferson Circuit Court entered a final judgment, a copy of which is filed with plaintiff's petition, marked "Exhibit 1," wherein it was ordered that the former judgment of said Court, entered October 31, 1914, be vacated, set aside, and held for naught, and it provided,

(a) That the plaintiff, Mackenzie, should recover $7,500.00 with interest and costs, from the Executors of said F. W. R. Eschmann; and,

(b) That Mackenzie,

"Has a lien upon Certificate No. 24 of the capital stock of A. Engelhard & Sons Company, a corporation, for one hundred and thirty (130) shares of the capital stock in said Company, and upon any certificate or certificates which have been or may haereafter be issued by A. Engelhard & Sons Company to the defendants, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said Certificate No. 24, and has a lien upon said one hundred and thirty (130) shares of stock represented by said certificate, said lien being to secure the plaintiff in the payment of the debt evidenced hereby and his costs herein."

Said judgment provided for a sale to enforce their said lien and also directed the Executors of the estate of F. W. R. Eschmann, deceased, to return said Certificate No. 24 for one hundred and thirty (130) shares of stock to the Court.

The said Executors have never returned said Certificate No. 24 to the Court, (and no step was taken by the plaintiff, Louis B. Mackenzie, in said action #78411, to compel them to do so.)

On July 15, 1918, and pursuant to said judgment, the Commissioner of the Jefferson Circuit Court, Kentucky, proceeded to hold a sale as directed by the Court, and R. A. McDowell, who had acted as the attorney of record for F. W. R. Eschmann, and for A. Engelhard & Sons Company, in case #78411, in the Jefferson Circuit Court, Kentucky, and who is now the attorney of record for the defendant herein, attended at said sale and publicly stated to all persons attending said sale that Certificate No. 24 for the 130 shares of stock referred to in the judgment and advertisement of sale had [fol. 25] been cancelled, as the stock had been transferred by Eschmann during his lifetime, and that there was no stock in the Engelhard Company in the name of Eschmann or his Executors, and that Certificate No. 24 was not then in existence, having been cancelled.

Louis B. Mackenzie, at said sale, on July 15th, 1918, bid One Hundred ($100.00) Dollars therefor, and was the highest bidder, after which said Commissioner reported to the Court a sale to Louis B. Mackenzie, and a conveyance to him of,

"The said one hundred and thirty (130) shares of capital stock of A. Engelhard & Sons Company hereinabove described, and evidenced by Certificate No. 24, or by any certificate or certificates which may have been or may hereafter be issued by A. Engelhard & Sons Company to the defendants, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said Certificate No. 24."

The said report of sale was confirmed by the Jefferson Circuit Court, and on October 30, 1918, a Bill of Sale was ordered by the Court to be executed and delivered to Louis B. Mackenzie and it was so executed and delivered to Mackenzie.

12. On April 29, 1919, Louis B. Mackenzie, presented to A. Englehard & Sons Company, a certified copy of the said Bill of Sale from the Jefferson Circuit Court, and demanded that it deliver to him a new certificate for 130 shares of its capital stock, but presented no certificate of stock in A. Engelhard & Sons Company.

A. Engelhard & Sons Company declined to issue to said Mackenzie any certificate of stock in response to his said demand. It is stated to said Mackenzie that said Certificate No. 24 had been cancelled on February 20th, 1915, by direction of F. W. R. Eschmann, during his lifetime, and that no stock stood in the name of the Executors of the estate of F. W. R. Eschmann, or either of them.

13. All of the capital stock of A. Engelhard & Sons Company that it is authorized by law to issue has been issued, and is outstanding, and certificates for all of said authorized stock had been issued and were outstanding at the time of said demand.

14. The following documents are genuine, and shall be used as evidence in this action:

[fol. 26] (1) Copy of the judgment of the Jefferson Circuit Court dated November 7, 1914, filed with the defendant's amended answer

and marked "Exhibit Judgment"; and copy of the Court's opinion filed therewith.

(2) The opinion of the Court of Appeals of Kentucky, delivered March 6th, 1917, Mackenzie vs. Eschmann's Executors, 174 Ky. 450, reversing the above judgment.

(3) Copy of the judgment of the Jefferson Circuit Court, rendered October 31, 1917, which is filed with plaintiff's petition, marked "Exhibit 1."

(4) Copy of the Bill of Sale of the Commissioner of the Jefferson Circuit Court, dated December 7th, 1918, and filed with the plaintiff's petition, marked "Exhibit 2."

Louis B. Mackenzie, By Wm. Marshall Bullitt, Attorney. A. Engelhard & Sons Company, By R. A. McDowell, Attorney.

IN UNITED STATES DISTRICT COURT

EXHIBIT IN EVIDENCE

OPINION OF THE JEFFERSON CIRCUIT COURT IN MACKENZIE V. ESCHMANN—Rendered October 31, 1914

This action was instituted by Louis B. McKenzie, against F. W. R. Eschman, E. A. Eschman, E. F. Dunstan, and H. L. Patterson, all of whom are non-residents of Kentucky. The plaintiff is the holder of a note for $7,500.00, in which F. W. R. and E. A. Eschman are the makers, E. F. Dunstan is the pavee and H. L. Patterson is the endorser. The note is dated 25th July, 1911, and made payable on or before thirty days after date, and to secure the [fol. 27] payment — one hundred and thirty shares of stock in a Kentucky Corporation was pledged as collateral. The corporation whose stock was pledged was made a defendant but its demurrer to the petition was sustained.

None of the defendants are before the court except F. W. R. Eschmann, the owner of the stock pledged.

The purpose of the action was to subject the shares of stock to the payment of the note, and, since F. W. R. Eschmann has made defense to secure personal judgment against him for whatever balance may remain due if the stock should not sell for enough to discharge the debt.

Among other contentions the defendant pleads that the note was procured from him by fraud, covin, and deceit, practiced by Patterson; that it is without consideration, that plaintiff is not a holder in due course for value, and that he, the plaintiff, had notice of the infirmities above mentioned.

The facts are substantially as follows: H. L. Patterson, of Chicago, was a large holder of stock in a corporation engaged in the business of publishing a magazine known as the American Educational Re-

view. He was the chief officer of the concern, and was actively and almost exclusively in charge of its business. F. W. R. Eschman, and his son, E. A. Eschman, resided in New York, where the younger Eschman had been employed in the business department of a concern which published a magazine. Young Eschman, and his friend, Dingwall, who had been soliciting advertisements for a magazine were seeking an opportunity to get into the business on their own account. They met Patterson who had recently opened a branch office in New York City, and after a brief acquaintance an arrangement was made by which Patterson was to take them into business with himself, in the publication of his magazine. This was to be accomplished by the young men buying a majority of the capital stock of the corporation which issued the publication. Neither of the young men had any money and it was proposed that Eschman's father, the defendant, help them provide the means. After some negotiations the defendant agreed to execute the note in controversy, and secure it by a pledge of his share of stock in the Kentucky Corporation, and later provide other funds necessary to effectuate the agreement. The exact amount of money, which the senior Eschman was to advance is not made clear, nor is it quite clear just what the agreement between E. A. Eschman, Dingwall, and Patterson was, but it is probably as related by Patterson, that is they were to [fol. 28] pay $15,000.00 cash and $10,000.00 in one year for a majority of the stock, Dingwall had nothing and the senior Eschman was short of funds, hence the resort to the short note with collateral security.

The note at the instance of Patterson, was made payable to one E. F. Dunstan, and that name appears to have been endorsed upon the note. Thereafter Patterson endorsed the note himself and taking it to Chicago transferred it to, or sold it to his friend, the plaintiff, McKenzie. Before the maturity of the note, and without advising the Eschmans that the note had been disposed of, Patterson drew on Eschman for $2,500.00, and his draft was paid. For a year after the note was executed, Patterson sought to have Eschman pay the note, or renew it, but the latter seems to have been unable or unwilling to pay and declined to renew the note. In the meantime, plaintiff kept the note, and not until more than a year after maturity he notified Eschman that he had bought the note and required payment. He, plaintiff, says that Patterson had been assuring him from time to time that Eschman was hard run, but would pay presently, and as Patterson was in communication with Eschman, and himself an endorser, he allowed the time to slip by, being assured by Patterson's representations, and confident of the value of the collateral attached to the note. None of the stock has ever been delivered, but is still held by Patterson.

Plaintiff testified that in August, 1911, and before the maturity of the note, Patterson told him of this transaction with the Eschmans and asked him to buy the note, and that after some negotiations and inquiry into the value of the collateral, he took over the note, paying Patterson $1,350.00 in cash, cancelling a debt of $2,150.00 which Patterson owed him, and agreeing to assume and cancel another debt

of $4,000.00, which Patterson owed another concern, in which the plaintiff was interested.

By statute a negotiable bill purchased for value before maturity is, in the hands of an innocent holder, not open to defenses on the part of the maker. The burden is upon the maker to show that the holder is not a bona fide holder for value in due course. This rule is, however, subject to this exception; If the maker pleads and introduces proof to show that the note was stolen or was procured by fraud and deceit as alleged in the answer, the burden then shifts to the holder of the note to show that he is a bona fide purchaser for value before maturity. Daniels Negotiable Instruments, Sec. 815; Randolph on Negotiable Paper, Sec. 1024, 1025, et seq.

[fol. 29] One cannot read the proof filed in this action without arriving at the conclusion that Patterson sought to practice a gross fraud upon the Eschmans in the sale of the stock in the magazine publishing corporation to E. A. Eschmann, and that he sought through the forms of law to make the fraud effective by taking a negotiable note and transferring it to others.

The proof shows that Patterson was hard pressed for money, that he was borrowing from his friends. He owed the plaintiff and others some $6,150.00, and the letters which passed betwen him and his business associate Waller, showed that the corporation owed $50,000.00, was in a hopeless failing condition in January, and February, 1911, and that they desired to sell out and realize what they could on the venture. The magazine instead of a circulation of 30,000 had but 1,400, and had failed to issue the December, January and February numbers.

Patterson had the note made payable to one Dunstan, a mysterious person whom he described as a divorced woman, met him in a New York Restaurant, for the purpose of endorsing the paper. After the note had been executed, Patterson hurried to Chicago (according to his testimony), taking the note to his intimate friend and creditor who kept the note, and did not disclose his interest in it until more than a year after its maturity. This friend, the plaintiff, paid him $1,350.00 in cash, and releases him from certain debts aggregating $6,150.00. The negotiation of the note is not the usual business transaction, nor such as the plaintiff usually engages in. When asked how the $1,350.00 was paid the plaintiff—business man—says that he took Patterson to his bank where he cashed a check for $1,350.00 and gave the proceeds to Patterson, but he did not have the cancelled check, because it was his habit to destroy such checks when returned to him by the bank. Plaintiff and Patterson are intimates, one making personal loans to the other and cashing his checks. For a year following the execution of the note, Patterson was constantly endeavoring to have Eschman pay the note, or renew it.

Patterson, and his former business associate, Waller, are untruthful under oath, as shown by their testimony upon cross-examination, touching the letters which passed between them in January and February, 1911, and as to the financial condition of the corporation.

Throughout the two depositions of Patterson is an apparent understanding between plaintiff's Chicago lawyer and Patterson, which is not altogether explained by the fact that he has heretofore been also [fol. 30] Patterson's legal adviser. We may lay aside the coincidence of counsel having both men for clients, but we may properly bear in mind the uninterrupted harmony between McKenzie and Patterson, and the zealous cooperation of both to wrest from the defendant the rewards of Patterson's fraud. This court cannot, under the circumstances, believe that McKenzie is a bona fide holder for value of the note, but does believe that he is a full partner with Patterson in the fraudulent scheme to enforce the payment of the note. In other words, and to state it in legal phraseology, plaintiff has not satisfactorily sustained the burden of proof.

A judgment will be entered dismissing the petition and also the counter claim of defendant Eschman, awarding the defendant F. W. R. Eschman, costs.

Exceptions reserved for plaintiff.

31st October, 1914.

Samuel B. Kirby, Judge.

In United States District Court

Exhibit in Evidence

Judgment of the Jefferson Circuit Court in Mackenzie v. Eschmann—Entered Nov. 7, 1914

At a Court Held on November 7, 1914

This action coming on to be heard and after oral argument being submitted on the pleadings, exhibits and proof, and the court being sufficiently advised, it is considered and adjudged by the court that the plaintiff recover nothing of the defendant, and that the petition of the plaintiff, Louis B. Mackenzie, be and it is hereby dismissed.

It is further considered and adjudged that the defendant, F. W. R. Eschmann, be and he is hereby permitted to withdraw from the papers in the case the certificate for 130 shares of the capital stock of [fol. 31] the A. Engelhard & Sons So. filed herein as an exhibit, leaving a copy thereof in the record.

It is further considered and adjudged that the counter-claim of the defendant, F. W. R. Eschmann, be and it is hereby dismissed, to which the defendant objects and excepts. It is further considered and adjudged that said F. W. R. Eschmann recover of the plaintiff, Louis B. Mackenzie, his costs herein expended for which he may have execution.

To all of which the plaintiff objects and excepts and prays an appeal to the Court of Appeals, which is granted.

IN UNITED STATES DISTRICT COURT

EXHIBIT IN EVIDENCE

MACKENZIE

v.

ESCHMANN'S EXECUTORS

(Decided March 6, 1917)

Appeal from Jefferson Circuit Court (Chancery Branch No. 2)

1. Bills and Notes—Joint Makers—Fraud—Waiver. Where one of the two joint makers of a promissory note, as a ground of defense, relies on the fraud practiced on the other makers, he is likewise bound by the other makers' conduct in waiving the fraud.

2. Bills and Notes—Fraud-Actions—Waiver. Where a party, with knowledge of the fact that a contract has been obtained by fraud, thereafter enjoys the fruits of the contract and repeatedly affirms the contract by other unequivocal acts, he thereby waives the fraud and cannot rely thereon as a defense.

3. Bills and Notes—Payment—Agency of Endorser—Evidence. In an action on a promissory note, evidence examined and held insufficient to show that an endorser was the holder's agent for the purpose of receiving payment on the note.

Clarence C. Smith, Keith L. Bullitt and King, Brower & Hurlbut, for Appellant.
R. A. McDowell, for Appellees.

Opinion of the Court by William Rogers Clay, Commissioner; Affirming on the Cross-appeal and Reversing on the Original Appeal

On July 25, 1911, F. W. R. Eschmann and E. A. Eschmann executed and delivered to E. F. Dunstan their promissory note, whereby they agreed to pay to the order of E. F. Dunstan, on or before thirty days after the date thereof, the sum of $7,500.00, with interest at the rate of six per cent per annum. The note was secured by 130 [fol. 32] shares of the capital stock of A. Englehard & Sons Company, a Louisville corporation. The note bears the endorsements of E. F. Dunstan and H. L. Patterson.

Claiming that he purchased the note for value and before maturity, plaintiff, Louis B. Mackenzie, brought this suit against F. W. R. and E. A. Eschmann, E. F. Dunstan, H. L. Patterson and A. Englehard & Sons Company, to recover judgment on the note and enforce his lien upon the collateral by which the note was secured.

The case went to trial as to F. W. R. Eschmann alone. During the progress of the case F. W. R. Eschmann died, and the action was revived in the name of his executors. On final hearing the chancellor dismissed the petition. From this judgment plaintiff appeals and F. W. R. Eschmann's executors prosecute a cross-appeal.

The note was executed under the following circumstances: H. L. Patterson was a large holder of stock in, and the chief officer of, the American Educational Company, a corporation engaged in the business of publishing a magazine known as "The American Educational Review." F. W. R. Eschmann and his son, E. A. Eschmann, resided in New York, where the son had been employed in the advertising department of "Hampton's Magazine." Young Eschmann had a friend by the name of Dingwall, who had also been soliciting advertisements for magazines. The two were anxious to get into business on their own account. During the spring of 1911 they met Patterson, who had recently opened a branch office in New York City. After several conferences, they agreed to purchase a controlling interest in the American Educational Company. As neither of the young men had any means, the elder Eschmann agreed to finance the arrangement for his son, and it is probable, though not certain, that the Eschmanns were also to assist Dingwall. As each of the parties gives a different version of the contract, it is not exactly clear how much money the elder Eschmann was to furnish, but the chancellor found, and the attendant circumstances support the conclusion, that the Eschmanns were to pay $15,000 cash and $10,000 in one year for a majority of the stock. Upon the payment of these sums the stock was to be delivered by Patterson.

As it was not convenient at the time for the elder Eschmann to meet the cash payment, the Eschmanns executed the note in question with the understanding that it was to be discounted by Patterson. Patterson claims that as he could not secure the money from the payee, E. F. Dunstan, he had Dunstan endorse the note and thereupon took it to Chicago and sold it to the plaintiff, Mackenzie. At [fol. 33] that time he was indebted to Mackenzie in the sum of $2,150, and to a third party in the sum of $4,000. Both he and Mackenzie testified that the consideration for the transfer was the release of Patterson's indebtedness to Mackenzie, the procuring of a release of the third party's claim for $4,000, and the payment to Patterson of $1,350 in cash. The transfer took place and the consideration was paid about August 10, 1911, and therefore, prior to the maturity of the note. Patterson says that he has at all times been ready to turn over the stock upon the payment by the Eschmanns of the contract price.

In addition to denying the allegations of the petition and amended petition, the elder Eschmann defended on the ground that E. F. Dunstan was a fictitious payee and his endorsement on the note was forged by Patterson; that the note was materially altered after its delivery; that it was executed without consideration and was obtained by fraud.

Without stating the evidence with reference to the first defense and without expressing any opinion as to its legal effect if it had been sustained, we deem it sufficient to say that it is not supported by the proof.

We are also convinced, by a careful examination of all the evidence bearing on the question, that the charge that the note was materially altered is not sustained.

On the issue of fraud, the evidence, in brief, is as follows: The younger Eschmann and Dingwall both say that Patterson represented to them that the magazine had a paid subscription list of from 32,000 to 35,000, and that Patterson subsequently admitted that the list did not exceed 7,000. E. A. Eschmann also says that Patterson stated that the magazine was in a flourishing condition. In the record there are letters from a former secretary and treasurer of the American Educational Company addressed to Patterson, in one of which the writer states that the corporation was about $50,000.00 in debt, and that there would be little left for the stockholders, unless they bought some scholarships or space at a discount and worked it out. These letters also show that the subscription list is very much less than that stated by Patterson. The statute provides that

"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a [fol. 34] holder in due course." (Kentucky Statutes, section 3720b, subsection 59.)

Construing this section, it has been frequently held that where a maker shows that the execution of a note was induced by the fraud of the holder's transferror, the burden then shifts to the holder to show that he is a holder in due course. Muir v. Edelen, 156 Ky. 212; Barnard v. Napier, 167 Ky. 824. Here Mackenzie failed to testify that when he purchased the note he had no knowledge of the fraudulent representations alleged to have been made by Patterson. From the above evidence the chancellor concluded that the note in question was obtained by fraud, and as plaintiff did not rebut the prima facie case made out by defendant, he further held that plaintiff did not sustain the burden of showing that he was a holder in due course.

Whether the chancellor's finding of fraud is correct or not we deem it unnecessary to decide, for, even if its correctness be conceded, it seems to us that there is another feature in the case which makes the defense or fraud unavailable. It must be remembered that the executors of the elder Eschmann are not relying on fraud practiced directly on him, but upon fraud practiced upon his son. If, upon the one hand, they may rely upon fraud practiced upon the son, it likewise follows that they may be bound by the son's conduct in condoning or waiving the fraud. Misrepresentations of the circulation of "The American Educational Review" is the principal element of fraud relied on. Young Eschmann admits that "not very long after Mr. Patterson received the note" he obtained the information from

Patterson that the circulation of the magazine was not 32,000, but somewhere between 5,000 and 7,000. While he is not exactly certain as to the time, he says that he is sure that the information was imparted by Patterson in a conversation which occurred in the year 1911. On January 23, 1912, Dingwall executed to young Eschmann certain notes aggregating $5,200, which were endorsed by Eschmann and delivered to Patterson. In July, 1912, the two Eschmanns, Patterson and Dingwall, met at the office of Mr. Aplington, the elder Eschmann's attorney. Mr. Aplington's manner was such as to reflect on Patterson's good faith in the transaction. After Mr. Aplington left, the elder Eschmann apologized for Mr. Aplinton's attitude towards Patterson and said that they had no complaint to make of him, but they had found Patterson was fair and had done everything he [fol. 35] had agreed to do: After August 24, 1912, young Eschmann collected from Mrs. Houck the price of a scholarship, and kept the money under a claim of right to do so by virtue of his agreement with Patterson. It is the rule that a party to a contract obtained by fraud has but one election to repudiate or rescind the same. If he once determines his election, it is determined forever. Hence, if it is shown that he has at any time after knowledge of fraud, either by express words, or by unequivocal acts, affirmed the contract, his election is irrevocable. By clearly manifesting his intention to abide by the contract, he condones the fraud, and is without remedy. He cannot with knowledge of the fraud enjoy the benefits of the contract, and then file an action for deceit. Hartford Life Ins. Co. v. Hanlon, 139 Ky. 346; Smith v. Lewisport Bank, 27 R. 406. Here the younger Eschmann, after obtaining knowledge of the fraud, not only assured Patterson that he had acted in good faith, but endorsed notes for $5,200 for the purpose of carrying out the contract, and thereafter collected and retained money which he had no right to collect or retain except by virtue of the contract. Having, with knowledge of the fraud, enjoyed the fruits of the contract, and having repeatedly affirmed the contract by other unequivocal acts, he has thereby condoned the fraud and neither he nor his father's executors will now be permitted to rely on that defense.

It appears that a draft for $2,500 drawn by Patterson on E. A. Eschmann on September 7, 1911, was paid on September 19. E. A. Eschmann claims that he got this money from his father for the purpose of paying it on the note and sent it to Patterson with the understanding that it should be credited on the note. It is insisted on the cross-appeal that the executors are either entitled to recover this sum from plaintiff or to have the sum credited on the judgment, in case of a finding in favor of plaintiff. In reply to the first contention, it is sufficient to say that, in view of our conclusions on the main features of the case, there is no basis whatever for a judgment in favor of the executors for the sum mentioned. The only remaining question to be determined is whether the amount of the draft should be credited on the judgment in favor of plaintiff. In support of this contention it is argued that Patterson was plaintiff's agent for the purpose of collecting the note and that the payment to

Patterson was, in effect, a payment of plaintiff. Without passing on the question whether the evidence is sufficient to show that the money was collected by Patterson with the understanding that it should be credited on the note, it is sufficient to say that we fail to [fol. 36] find in the record any substantial basis for the claim that Patterson was in any sense plaintiff's agent in looking after the collection of the note. The evidence merely shows that plaintiff was looking to Patterson to see that the note was paid, because Patterson had discounted the note to plaintiff and was liable thereon as endorser. Since the payment was not made to plaintiff or his authorized agent, it follows that the judgment in favor of plaintiff should not be credited by the amount of the draft in question.

On the cross-appeal the judgment is affirmed.

On the original appeal the judgment is reversed and cause remanded, with directions to enter judgment in conformity with this opinion.

IN UNITED STATES DISTRICT COURT

EXHIBIT 1 IN EVIDENCE

JUDGMENT OF THE JEFFERSON CIRCUIT COURT IN MACKENZIE V. ESCHMANN—Entered October 31, 1917.

At a Court Held on the 31st Day of October, 1917

The mandate of the Court of Appeals of Kentucky ordering the reversal on the original appeal and the affirmance on the cross-appeal of the judgment entered herein on the 31st day of October, 1914, and ordering this cause to be remanded with directions to enter judgment in conformity with the opinion of the Court of Appeals, and said opinion having been filed herein, and it appearing that the original defendant, F. W. R. Eschmann, has died during the progress of the case and the action has been revived in the Court of Appeals in the name of his Executors, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, and this cause being now submitted for judgment pursuant to said opinion of the Court of Appeals, and the Court being advised, [fol. 37] it is now ordered and adjudged as follows:

1. The judgment rendered herein on the 31st day of October, 1914 is now vacated, set aside and held for naught.

2. The counter-claim filed herein by the defendant F. W. R. Eschmann, now deceased, is hereby dismissed and the plaintiff, Louis B. Mackenzie, do recover of the estate of F. W. R. Eschmann, deceased, and from the defendants Edgar A. Eschmann, and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased and out of any assets whatever found belonging to the estate of said F. W. R. Eschmann, deceased the sum of Seventy-five hundred ($7,500.00) Dollars, with interest at the rate of six per cent per

annum from June 25, 1911, until paid and the sum of $29.60, being the costs herein expended, for all of which he may have execution.

3. The plaintiff Louis B. Mackenzie has a lien upon certificate No. 24 of the Capital Stock of A. Engelhard & Sons Company, a corporation for 130 shares of the capital stock in said company and upon any certificate or certificates which have been, or may hereafter be, issued by A. Engelhard & Sons Company to the defendants Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said certificate No. 24, and has a lien upon said 130 shares of stock represented by said certificate, said lien being to secure the plaintiff in the payment of the debt evidence- hereby and his costs herein.

4. In order to satisfy the claim of the plaintiff herein, said shares of stock shall be sold on some Monday at or about the hour of 11:00 o'clock A. M. at the Court House door in the City of Louisville, Jefferson County, Kentucky, by public outcry to the highest and best bidder on the following terms to-wit: Cash.

The Commissioner is directed before making said sale, to advertise the time, place and terms thereof, together with a description of said property ordered to be sold and the amount to be raised by printed hand bills posted one at the Court House door in the City of Louisville, Jefferson County, Kentucky and one at three of the most public places in the vicinity of the place of sale for at least ten days preceding the day of sale and by three insertious in brief form in the Louisville Times for three consecutive days next preceding the day of sale. Said shares of stock shall be sold free of all liens and the proceeds of the sale shall be first applied toward the satisfaction of the debt, interest and costs of the plaintiff herein.

[fol. 38] 5. The defendants, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, are hereby ordered and directed to return to this Court said certificate No. 24 for 130 shares of the capital stock of the A. Engelhard & Sons Company and to file the same with the papers of this case.

This judgment may be executed immediately.

This cause is retained upon the docket for the making of such further orders and judgments as to the Court may seem proper.

[Certificate under Act of Congress omitted by consent of parties.]

IN UNITED STATES DISTRICT COURT

EXHIBIT 2 IN EVIDENCE

Bill of Sale, Dated Dec. 7, 1918

This bill of sale, made and entered into this 7th day of December, 1918, between Edgar A. Eschmann and Bettina Eschmann, Execu-

tors of the estate of F. W. R. Eschmann, deceased; E. A. Eschmann, E. F. Dunstan; H. L. Patterson and A. Engelhard & Sons Co., a corporation;—parties of the first part, all by Eustace L. Williams, Commissioner of the Jefferson Circuit Court, and Louis B. Mackenzie, party of the second part,

Witnesseth:

That, whereas, on the 10th day of March, 1913, the said Louis B. Mackenzie instituted an action against F. W. R. Eschmann, and Others, No. 78411, in the Jefferson Circuit Court, Chancery Branch, Second Division; and, whereas, on April 8th, 1914, May 25th, 1914 and December 7th, 1914, respectively, Amended Petitions were filed in said cause;—wherein certain proceedings were had, and orders were made; and, among others, it was sought to sell free of all liens.

The following-described stock, to-wit:

[fol. 39] One Hundred and Thirty shares of the capital stock of A. Englehard & Sons Company, a corporation, evidenced by Certificate No. 24 or any Certificate or Certificates which have been, or may hereafter be, issued by A. Engelhard & Sons Company to the defendants Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said Certificate No. 24.

And such proceedings were had in such cause that a Judgment was rendered in substance ordering the Commissioner of the Jefferson Circuit Court to sell at the Court House door on some Monday at about the hour of 11 o'clock A. M., the above described stock, and under that Judgment the Commissioner of said Court reported a sale thereof as of the 15th day of July, 1918, to the said Louis B. Mackenzie at the sum of $100.00 (One Hundred Dollars). Said bid and purchase-price ($100.00) being less than said purchaser's debt, interest and costs, was not demanded of, or paid, by said purchaser. Said Report of Sale was confirmed by said Court and the Commissioner was ordered on October 30th, 1918, to execute and deliver to the said Louis B. Mackenzie a Certificate or Bill of Sale evidencing the purchase of the 130 shares of the capital stock of the A. Engelhard & Sons Company hereinabove set out. All of which more at large appears by reference to said cause; which reference is now here made for greater certainty.

Now, therefore, in consideration of the premises, the undersigned, Eustace L. Williams, Commissioner of the Jefferson Circuit Court, for and on behalf of the parties of the first part, do- hereby convey to the second party hereto, Louis B. Mackenzie, the said 130 shares of the capital stock of the A. Engelhard & Sons Company hereinabove described and evidenced by Certificate No. 24, or by any certificate or certificates which may have been or may hereafter be issued by A. Engelhard & Sons Company to the defendants, Edgar A. Echmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said Certificate No. 24.

In testimony whereof, the said Williams, as Commissioner, has hereunto set his name and affixed his seal the day and year first within written.

[fol. 40] Examined and approved 7th day of December, 1918.
Eustace L. Williams, Commissioner Jefferson Circuit Court,
Per W. N. Caldwell, D. C. Saml. B. Kirby, Judge.

COMMONWEALTH OF KENTUCKY,
Jefferson Circuit Court:

At a court held for the Court aforesaid on the 7th day of December, 1918, came Eustace L. Williams, Commissioner, and produced in Court the within and foregoing Bill of Sale to Louis B. Mackenzie and executed and acknowledged the same as Commissioner for and on behalf of the First parties therein named to be their act and deed.

(Signed) Frank Dugan, Clerk Jefferson Circuit Court, By J. M. Hunt, D. C.

Stamped with $2.60 worth of stamps, marked "E. L. W., Com'r., 12/7/1918."

IN UNITED STATES DISTRICT COURT

CONSENT ORDER—Entered March 30, 1921

This day came the parties and by consent it is ordered

1. That the defendants' Amended Answer tendered herein October 11, 1920 be, and the same hereby is filed.

2. That the stipulation of agreed facts (with a copy of the opinion of Kirby J. in the Jefferson Circuit Court rendered October 31, 1914, attached thereto) is hereby filed.

[fol. 41] IN UNITED STATES DISTRICT COURT

OPINION—Filed April 23, 1921

At the outset of this litigation there was a motion made by the defendant to dismiss the bill, but upon grounds quite fully stated in our opinion of May 27th, 1920, we overruled that motion. It would avail nothing to restate the views then expressed, though we dealt there with what is yet important and to a large extent must control our decision now. However, the presentation made by the answer of the defendants and the stipulation as to all the applicable facts appropriately call for some additional suggestions in order to a clear understanding of the whole case as now presented on final hearing.

The fundamental reason for overruling the motion to dismiss the bill was that the corporation of A. Engelhard & Sons Company had, by reason of being a party to the action in the Jefferson Circuit Court, not only been given notice of the claims of the plaintiff made in that action, but were thereby afforded positive knowledge of plaintiff's claim and of the pledge to him of 130 shares of the defendant's capital stock represented by Certificate 24. It also furnished positive knowledge to the defendant that the claim to those shares and no other was to be adjudicated in that case. Possibly that knowledge may be said to have been somewhat emphasized by the fact that F. W. R. Eschmann, the pledgor of the 130 shares to the plaintiff, was at the time a brother-in-law of the president of the defendant.

In the stipulation of facts filed of record there are, among others, the following statements:

"(a) To R. A. McDowell, in payment of his fee in said suit, 25 shares, which were later sold by McDowell for $2,500.00 cash, and transferred to V. H. Engelhard by R. A. McDowell. R. A. McDowell was the attorney of record for the defendants, F. W. R. Eschmann, Edgar A. Eschmann, and A. Engelhard & Sons Company, in cause #78,411, in the Jefferson Circuit Court, Kentucky, and on the appeal of said cause to the Court of Appeals of Kentucky, was attorney of record for Bettina E. Eschmann and Edgar A. Eschmann, as Executrix and Executor respectively, of the estate of F. W. R. Eschmann, deceased.

V. H. Engelhard was a brother of Mrs. F. W. R. Eschmann, and on December 10, 1912, and thereafter, until the date of his death, to wit: (subsequent date of transfer of the 25 shares of the capital stock of A. Engelhard & Sons Company from R. A. McDowell to said V. H. Engelhard), the president and the executive head of said [fol. 42] A. Engelhard & Sons Company, and was the person on whom the demand mentioned in Paragraph 3, supra, was made on December 10, 1912.

(b) To Bettina E. Eschmann, 105 shares which stand on the books in her name today (issued in two certificates, one for 40 shares and one for 65 shares). Said Bettina E. Eschmann was, at the date of said transfer, the wife of F. W. R. Eschmann, and now is executrix of the estate of F. W. R. Eschmann, deceased.

F. W. R. Eschmann and Bettina E. Eschmann were on December 10, 1912, husband and wife, living together as such, and so continued until the death of F. W. R. Eschmann which occurred on or about April 26th, 1915. The fact of said relationship to each other and living together of said F. W. R. Eschmann and Bettina E. Eschmann during the period aforesaid was known to V. H. Engelhard."

All of the persons who got portions of the 130 shares of the defendant's capital stock when Certificate #24 was "split up" may have confidently thought that the early action of the State court sustaining the demurrer of A. Engelhard & Sons Company to the

petition therein pending would prevent any further trouble as to those shares, and they may all have been confident that that action of the State court would be approved upon appeal, but that confidence or assumption or belief would not, as matter of law, relieve them of any obligation in respect to that 130 shares which might be made clear by any reversal of the judgment of the Jefferson Circuit Court.

Prima facie it made no difference to the defendant corporation what individuals became the holders of its capital stock, and that particular question was not of itself of any special moment to it, but it was a matter of prime importance to the defendant as to whether it should wrongfully and with such knowledge of the facts, issue certificates for that 130 shares of stock to others than those who might ultimately be held by the State courts to be entitled to it.

Especially can not the defendant very persuasively urge the argument necessary to support its contention when this stock was used first to pay to the attorney a $2,500 fee in that litigation and when the other 105 of the 130 shares were delivered to other persons who were of kin to the president of the Company. Those things, per se, might not have been in any way wrong, but they seem to have presented a temptation to speedy action in order to set up a barrier to plaintiff's claim.

The argument of counsel for the defendant appears to go outside [fol. 43] of the concrete situation now presenting itself, inasmuch as the cases cited by him, though probably abstractly correct, do not deal with a case like this, where superseding the judgment by plaintiff was not important in view of other facts which affect the defendant corporation in its relations to all concerned, including the plaintiff.

The fact that the judgment was not superseded did not in any way alter the obligation of the defendant to see to it that the 130 shares of stock evidenced by Certificate #24 should be kept in condition to meet any duty or obligation devolving on the corporation when final judgment should ultimately be rendered by the State courts, and as the mere distributor of certificates of the stock to those entitled, defendant should have kept the situation intact, so as to meet the requirements of any judgment in the litigation in the State court. And for its own safety it might have demanded indemnity before it acted.

Prima facie, as we have said, it was a matter of indifference to the defendant corporation as to who should hold the title to its stock, but if, having notice of the facts, it participated (as was done here) in the giving of certificates of that stock to persons other than those who were entitled thereto, it could not thereby deprive plaintiff of his rights to the stock in the corporation.

In short, under the circumstances, the defendant having full notice of the facts, it was its duty not to transfer that stock to anybody except under the judgment of the court. Until that judgment was finally rendered it was its duty, as well as its right, to preserve the status so that it might be able to meet the requirements of whatever

judgment might be rendered. Its failure to do that subjects it to a liability to the plaintiff, and the fact that the fee of Mr. McDowell was due from whoever employed him did not support a conclusion that that fee could be paid out of stock ultimately to be adjudged to be owned by some other stockholder than the debtors of the attorney.

Another clause in the stipulation of facts is in the words:

"F. W. R. Eschmann nowhere recorded any transfer or assignment of said 105 shares of stock of A. Engelhard & Sons Company to Bettina E. Eschmann, except on the corporate books of A. Engelhard & Sons Company."

It is urged by plaintiff that one provision of Section 2128 of the Kentucky Statutes is important in this connection. That provision reads as follows:

[fol. 44] "A gift, transfer or assignment of personal property between husband and wife shall not be valid as to third persons, unless the same be in writing, and acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded; but the recording of any such writing shall not make valid any such gift, transfer or assignment which is fraudulent or voidable as to creditors or purchasers."

It may be that these provisions should also be given force, but the court prefers to put its decision upon the grounds stated.

It seems to us clear, therefore, that the plaintiff is entitled to relief, but whether that relief shall be the value of the stock at the time this suit was brought or later, or whether the measure of damages to be recovered against the defendant will be $7,500 with interest from the date of the maturity of the note, that being the amount for the payment of which the stock was pledged, are questions which should be considered in fixing the proper amount, and, unless counsel can agree, the court will hear testimony as to the value of the 130 shares of stock of the defendant Company as of the date of bringing this action, or as to the date of the failure to issue certificates of stock after the sale to the plaintiff.

Walter Evans, Judge. April 23rd, 1921.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL STIPULATION OF AGREED FACTS—Filed April 29, 1921

It is agreed between the parties hereto, as follows, to-wit:

1. The reasonable market value of shares of the capital stock of A. Engelhard & Sons Co. was One Hundred and Thirty ($130.00) Dollars per share on each of the dates mentioned in the pleadings herein.

[fol. 45] 2. A. Engelhard & Sons Company have declared and paid the following dividends upon its capital stock out of earnings, to-wit:

For preceding Fiscal year, November 30, 1918, 25 per cent.
" " " " November 30, 1919, 18 per cent.
" " " " November 30, 1920, None.
(Business showed loss.)

The capital stock of the A. Engelhard & Sons Co. was during 1918 and 1919 One Hundred and One Thousand ($101,000.00) Dollars per value, and in 1920 was increased to One Hundred and Twelve Thousand ($112,000.00) Dollars par value.

Wm. Marshall Bullitt, Attorney for Plaintiff. R. A. McDowell, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

OPINION—Filed April 29, 1921

The opinion of the court delivered herein on the 23rd inst. left open the question of the measure of damages for further argument. This has been had, and the court is of opinion that the fundamental basis for plaintiff's recovery was the knowledge the defendant had of his claim, which claim may be stated thus: On July 25th, 1911, a note was executed by F. W. R. Eschmann to E. F. Dunstan which was secured by a pledge to Dunstan of 130 shares of the capital stock of defendant corporation. This note was for $7,500, and bore interest from its date. It was endorsed and transferred by Dunstan to the plaintiff who brought this action. In doing this he gave the defendant not only notice, but full knowledge of his title, not indeed as the owner but as the pledgee of the stock to secure the note. It was because defendant knew these facts that we have held that the plaintiff is entitled to have a proper judgment against defendant in this action.

[fol. 46] It has been this day stipulated in writing between the parties that under a judgment of the State court in the case referred to in the pleadings there was a sale of the pledged stock, and that as a result on December 7th, 1918, a judicial bill of sale to the 130 shares of stock was executed and delivered to plaintiff.

It has been stipulated in writing filed that on November 30th, 1919, a dividend of 18 per cent had been declared and paid by the defendant on the 130 shares. This dividend amounted to $2,340, which should bear interest from the date of payment. It was also stipulated that no dividend on defendant's capital stock had been declared or paid since that time, though it is also stipulated that on November 30th, 1918, a dividend of 25 per cent had been declared and paid on its stock including the 130 shares herein referred to, and furthermore that this 25 per cent was paid out of the earnings of the year ended November 30th, 1918. But it will be noticed that

the last named dividend was declared and paid before plaintiff was invested with the legal title to the 130 shares of stock.

In this situation what shall the court do? After careful consideration we have concluded that the plaintiff is entitled to recover $7,500 with interest thereon from July 25th, 1911, to December 7th, 1918, the total amount thereof being $10,816.25, and that in addition thereto the plaintiff is entitled to recover the amount of the dividend declared and paid November 30th, 1919. As that dividend was 18 per cent it makes an additional amount, including interest thereon from the date of payment to this time, to be recovered by the plaintiff of $2,538.50.

The judgment of the court will be that the plaintiff is entitled to recover from the defendant the sum of $13,354.75 with interest thereon from this date until paid.

Walter Evans, Judge. April 29th, 1921.

[fol. 47] IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed April 29, 1921

This action coming on for further hearing the arguments of counsel were again heard, and thereupon consideration thereof the court delivered a further opinion thereon, which is filed, and pursuant thereto and to the opinion delivered on April 23rd, 1921, it is now ordered, adjudged and decreed by the court that the plaintiff, Louis B. Mackenzie, do have and recover of the defendant, A. Engelhard & Sons Company the sum of Thirteen thousand three hundred and fifty-four and 75/100 ($13,354.75) dollars, with interest thereon from this date until paid and his costs herein expended, as the same may properly be taxed by the Clerk, and plaintiff may have execution thereon in due course.

It is further ordered, adjudged and decreed that upon the payment of the sums herein adjudged, the plaintiff will have no further claim to nor interest in the 130 shares of stock in the defendant Company described in the pleadings.

Walter Evans, Judge. Enter April 29, 1921.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS BY LOUIS B. MACKENZIE—Filed May 4, 1921

The plaintiff, Louis B. Mackenzie, files this, his Assignment of Errors, to wit:

1. The Court erred in refusing to decree that the defendant, A. Engelhard & Sons Co. should issue and deliver to the plaintiff, Louis B. Mackenzie, a certificate of stock certifying that Louis B. Macken-

zie is the owner of 130 shares of the capital stock of the A. Engelhard & Sons Co.

2. The Court erred in refusing to enter a decree in favor of the plaintiff, Louis B. Mackenzie for the full value of the said 130 shares [fol. 48] of stock at the stipulated value thereof, to wit: One Hundred and Thirty ($130) Dollars per share, plus the two dividends heretofore declared thereon, to wit: 25 per cent dividend on November 30, 1918, and 18 per cent dividend on November 30, 1919, with 6 per cent interest thereon from the respective dates of such declaration of said dividends.

3. The Court erred in adjudging that the plaintiff, Louis B. Mackenzie should have no further interest in the 130 shares of stock in controversy if and when the defendant should pay to said plaintiff Thirteen Thousand Three Hundred and Fifty-four Dollars and Seventy-five Cents ($13,354.75), with interest from the date of the entry of the decree.

Wm. Marshall Bullitt, Counsel for Louis B. Mackenzie.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS BY A. ENGELHARDT & SONS CO.—Filed May 4, 1921

The defendant, A. Engelhard & Sons Co., files this, its Assignment of Errors, to wit:

1. The Court erred in failing and refusing to dismiss the plaintiff's Bill in Equity herein.

2. The Court erred in holding that the plaintiff, Louis B. Mackenzie, was entitled to recover from the defendant the sum of Thirteen Thousand Three Hundred and Fifty-four Dollars and Seventy-five Cents ($13,354.75), with interest from April 29, 1921, or any sum.

3. The Court erred in holding that Louis B. Mackenzie was entitled to recover from the A. Engelhard & Sons Co. the sum of Seventy-five Hundred ($7,500) Dollars, with interest from July 25, 1911 to December 7, 1918, or any part thereof.

4. The Court erred in holding that Louis B. Mackenzie was entitled to recover Twenty-three Hundred and Forty ($2,340.00) Dol- [fol. 49] lars on account of a dividend declared on November 30, 1919, or any part thereof or any interest thereon.

R. A. McDowell, Counsel for A. Engelhard & Sons Co.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING APPEALS—Entered May 4, 1921

This day came the plaintiff, Louis B. Mackenzie, by Wm. Marshall Bullitt, Attorney, and the defendant, A. Engelhard & Sons Co., by R. A. McDowell, Attorney, and the plaintiff and defendant each respectively presents his or its Petition for Appeal, Assignment of Errors, and Appeal Bond, praying for an appeal from the final decree herein to the United States Circuit Court of Appeals for the Sixth Circuit, and

It is ordered that each of said bonds be, and the same hereby is approved, and that the Assignments of Error and Petitions for Appeal be each respectively filed, and that the respective appeals of the plaintiff and the defendant to the United States Circuit Court of Appeals for the Sixth Circuit be, and the same hereby are respectively granted.

Walter Evans, Judge.

[fol. 50] IN UNITED STATES DISTRICT COURT

STIPULATION—Filed May 4, 1921

It is agreed between the plaintiff and defendant, as follows, towit:

1. The respective appeals of Louis B. Mackenzie and of A. Engelhard & Sons Co. having each been duly applied for, allowed, and appeal bonds executed and approved, there shall be omitted from the printed transcript on appeal, the respective petitions for appeal and appeal bonds.

Louis B. Mackenzie and A. Engelhard & Sons Co. by their respective counsel each expressly waived the issuance of a citation and each respectively entered its appearance to the appeals herein allowed to the United States Circuit Court of Appeals for the Sixth Circuit.

2. This printed transcript has been jointly prepared by Counsel; and the Clerk of the United States District Court for the Western District of Kentucky is hereby authorized and directed to consider such printed transcript as the transcript on appeal herein, and to certify and transmit such printed transcript to the United States Circuit Court of Appeals for the Sixth Circuit.

This stipulation shall serve as the præcipe.

Wm. Marshall Bullitt, Counsel for Plaintiff. R. A. McDowell, Counsel for Defendant.

The foregoing stipulation of facts, the exhibits filed therewith and stipulation of counsel reducing the record has been examined, and is hereby approved.

Walter Evans, District Judge.

[fols. 51 & 52] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, A. G. Ronald, Clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing transcript consisting of 50 pages, constitutes a full, true and correct transcript of all that portion of the record and proceedings had in said Court in a certain cause entitled Louis B. Mackenzie, Plaintiff, v. A. Engelhard & Sons Co., Defendant, and required to be copied herein in ac-ordance with the stipulation of Counsel on file and copied herein, as the same appears of record and on file in my said office.

Witness my hand and official seal of said Court, this 10 day of May, 1921.

A. G. Ronald, Clerk.

[fol. 53] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL FOR APPELLANT—Filed May 13, 1921

Arthur B. Mussman, Clerk of said Court:

Please enter my appearance as counsel for the appellant.

Wm. Marshall Bullitt.

APPEARANCE OF COUNSEL FOR CROSS-APPELLANT—Filed May 13, 1921

Arthur B. Mussman, Clerk of said Court:

Please enter my appearance as counsel for the cross-appellant.

R. A. McDowell, Attorney for A. Englehard & Sons Co.

CAUSE ARGUED IN PART

Before Knappen, Denison, and Donahue, C. JJ.

November 8, 1922.

These causes are argued together by Mr. William Marshall Bullitt on behalf of Louis B. Mackenzie and by Mr. R. A. McDowell on behalf of A. Englehard & Sons Co. and are continued until tomorrow for further argument.

[fol. 54] FURTHER ARGUED AND SUBMITTED

November 9, 1922

These causes are further argued by Mr. R. A. McDowell on behalf of the A. Englehard & Sons Company and by Mr. William Marshall Bullitt on behalf of Louis B. Mackenzie and are submitted to the Court.

IN U. S. CIRCUIT COURT OF APPEALS

DECREE IN #3581—Filed Feb. 6, 1923

Appeal from the District Court of the United States for the Western District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby modified and the cause remanded for entry of a new decree in accordance with the opinion of this Court. No costs in this Court are awarded.

IN U. S. CIRCUIT COURT OF APPEALS

DECREE IN #3582—Filed Feb. 6, 1923

Appeal from the District Court of the United States for the Western District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby modified and the cause remanded for entry of a new decree in accordance with the opinion of this Court. Appellant will recover the costs of this Court.

[fol. 55] UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

[Title omitted]

Before Knappen, Denison and Donahue, Circuit Judges

OPINION—Filed Feb. 6, 1923

Eschmann owned 130 shares of stock in the Engelhard Company,—a Kentucky corporation (hereafter called the Company). He became surety upon a note for $75,000, and he delivered to the payee, as collateral security, the certificate for this stock. Mackenzie later purchase this note. It provided for a lien upon the stock by way of security, but the certificate was not endorsed in blank or otherwise by Eschmann. Thereafter Mackenzie brought suit in a Kentucky equity court to collect his debt against Eschmann, and to foreclose his lien upon the stock. He filed the certificate in the court as an exhibit to his complaint. Eschmann defended on the ground that he had been defrauded into giving the note and that Mackenzie was not a good faith purchaser. The chancellor sustained this defense, and the decree in Eschmann's favor included a provision that he might withdraw the certificate from the court files. Mackenzie promptly appealed, but did not take the steps necessary to supersede the decree. Accordingly Esch-[fol. 56] mann withdrew the certificate, surrendered it, and the Company issued two new certificates in place thereof—one for 105 shares to Eschmann's wife and one for 25 shares to his attorney. The Company and its president had full knowledge of Mackenzie's claim and of the pending suit, and it is not shown that either the attorney or the wife was a purchaser without notice. Shortly thereafter the 25 shares were transferred and reissued to Mr. Engelhard, the president of the corporation. In due course the appeal was heard, and the Court of Appeals decided that Mackenzie was a good faith purchaser. Accordingly it reversed the decree, sustained the lien upon the stock, directed that Mackenzie should have judgment for his debt and that his lien should be enforced by a sale of the stock. The chancery court thereupon entered judgment and an order of sale. The sale was had before a commissioner, and the stock was bid in by Mackenzie, but the attorney for the Eschmann-Engelhard interests gave notice at the sale that nothing would pass, and so it was bid in for a nominal price. The sale was duly confirmed and the commissioner ordered to execute an efficient bill of sale or transfer, and he did so. Mackenzie presented to the Company the bill of sale and demanded a certificate for the 130 shares. The Company refused, on the ground that valid certificates for this stock were outstanding and it could not over-issue its capital stock. Mackenzie thereupon brought this suit upon the equity side of the court below, asking that the Company be required to issue this certificate to him, or, in the alternative, that he have judgment against the Company for the value of this stock (which value was stipulated),

and for the dividends paid to Mrs. Eschmann and Engelhard since Mackenzie's foreclosure purchase. The court below held that Mackenzie was entitled to a judgment against the Company for the amount of his lien, with interest, and for the dividends which had been paid out of the earnings which had accrued subsequent to Mackenzie's purchase, but denied further relief. Both parties appeal. Mackenzie complains that he should have had either the certificate or its full value, and also all dividends declared after its purchase; the Company complains that any decree was rendered against it.

DENISON, Circuit Judge: We have no doubt that in spite of the withdrawal of the certificate from the court files, the state court re- [fol. 57] tained jurisdiction over the subject matter sufficiently to decree a foreclosure sale valid as between the parties; and, for the purpose of this opinion, and without undertaking to decide the questions involved, we assume that the foreclosure of the lien upon the stock was so completely valid that as against both Eschmann and purchasers pendente lite Mackenzie acquired the legal title to the stock, and that in an action at law against the corporation for its refusal to reissue the stock to him, he would be entitled to recover full damages. Mackenzie has not brought such an action. He has applied to a court of equity for what would be, in effect, a mandatory injunction compelling the issuing of the stock certificate to him and asking in the alternative that if a new certificate can not be lawfully issued to him, the value of the stock should be ascertained and the Company directed to pay him that value. His primary effort is to get the specific article, the stock, which on account of prospective earnings, or voting power, may seem worth to him much more than its market value. It is fundamental that a plaintiff who does not rely upon his strict legal rights but asks special relief from a court of equity, subjects himself to the equitable discretion of that court, and may be denied some measure of his legal rights if to grant them all would be distinctly inequitable. We think this case is one for the application of this principle, and this for reasons which depend upon the peculiar facts of the case, and which we proceed to develop.

The surrender and reissue of the certificate did not occur under circumstances which made the act wrongful as against Mackenzie in the manner and degree to which such an act is ordinarily wrongful as against the true owner. On the contrary, while Mackenzie did not directly acquiesce in the withdrawal of the certificates, he contributed to create the situation attending the withdrawal, surrender and reissue. To obtain a supersedeas would apparently have been no burden and would have avoided all later complications; and while it may be assumed that the lien upon the stock was in law reinstated ab initio when the judgment was reversed, yet the intermediate transfer and reissue would not have occurred if Mackenzie had taken the customary precautions to preserve his interests.

In any event, and even if Mackenzie had retained possession of the certificate, but lacking legal title thereto, Eschmann would have

been entitled to surrender and require reissue thereof to his nominees, provided the security interest of Mackenzie was protected. In view of the pending litigation as to the existence of Mackenzie's interest, [fol. 58] and the undisputed existence of substantial interest in Eschmann, it would seem that a court would have compelled the issue of a new certificate to Eschmann's nominees, if that certificate should have had endorsed upon it a memorandum that it was subject to whatever lien Mackenzie might establish. The wrong done to Mackenzie was therefore the issuing of the new certificate in such a way that it might reach a bona fide purchaser and so perhaps cut off Mackenzie's lien, but the wrong did not extend to the entire value of the stock, since Mackenzie had therein no interest to be injured except to the extent of his lien.

In this situation the parties came to the foreclosure sale of the stock. Its value was $17,000; the lien was about $10,000. It was quite evident that no sale could be had at which any fair value could be realized. No counsel would undertake to advise with certainty what title would pass. The books of the corporation showed no interest to sell. No stranger would pay a substantial price, because he would be buying only a law suit. Eschmann and his vendees would not bid, because they were advised and doubtless in good faith believed that no title would pass. The actual result was inevitable, viz., that Mackenzie would buy in the $17,000 of stock for a nominal price (he paid $100) and still leave his whole claim against Eschmann for the debt practically unimpaired. This would be and was a grossly inequitable result. The situation could have been easily clarified, and it was Mackenzie's duty to procure that clarification before going to sale, if he expected to seek the aid of a court of equity in enforcing his rights as purchaser. An appropriate proceeding could have been taken in the equity court where the case was pending, and probably as ancillary or supplemental to that case, whereby it would have been adjudicated, as between Mackenzie, the corporation, Eschmann and the purchasers pendente lite, just what title would pass by the expected sale. After such an adjudication the sale would have been fair to all concerned and all suitable equitable enforcement remedies could have been asked without embarrassment.

In the strongest light in which the situation could be stated for plaintiff, it would be as if the reissued certificates had borne, in words, the qualification that they were subject to Mackenzie's interest, and by assuming that, even then, a foreclosure sale would absolutely cut off the title, not only of the parties but of all who had purchased since the suit was commenced, and hence, that there could [fol. 59] have been no equitable obligation to clear up the title before proceeding to sale. However, such a statement does not meet the full facts. In no such ordinary foreclosure would it appear that steps had been taken, pursuant to the decree against plaintiff and while unreversed, and under which new parties had become entitled to be heard as to whether their title was cut off— in other words, as to whether they were purchasers pendente lite within the meaning of that phrase in the rule which puts such purchasers in the position of their vendors.

The rule which shapes the relief given by a court of equity in circumstances where equitable considerations make that relief contingent upon plaintiff's acceptance of less than full legal rights, must vary in its application with every case. We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules.

We therefore conclude that as against the corporation, which in some measure represents its stockholders of record, and for the purpose of the decree which the court below, sitting in equity, ought to have rendered, it must be considered that at the time of plaintiff's demand upon the corporation for a transfer of stock, he had only a lien for his debt and interest, so that his measure of damages against the corporation in this equitable proceeding should be limited to the amount necessary to discharge such lien. The lien would, we think, include the costs of the state court proceedings up to the time of the decree of the trial court directing a sale, but not thereafter.

Defendant has interposed no claim that a court of equity was without jurisdiction because the remedy at law was adequate; and there is, to say the least, no such clear lack of jurisdiction that the court should raise that question.

The fact that the relief given turns out to be a money judgment only, does not necessarily control; nor yet the fact that, though plaintiff appealed to a court of equity to get more than strict legal rights, he gets less than they would have been if, as we have assumed merely for the purposes of this opinion, the full legal title passed by the sale.

It is urged that even though there was a wrong done to plaintiff by the transfer and reisue of the stock without saving his lien, yet that no damage has resulted to him, because the lien still exists, as against purchasers with knowledge, and that it is plaintiff's duty to pursue the purchasers, bring them into court, and enforce his lien, [fol. 60] unless they can prevail against him. As an original proposition, this would be forceful but, to the majority of the court, the contrary seems to be settled. Whether the corporation is held as for a conversion, or on the ground of negligence as a trustee, it is liable to the rightful owner in damages, and he is not obliged to pursue the purchaser. Telegraph Co. v. Davenport, 97 U. S. 369, 371; St. Romes v. Cotton Press Co., 127 U. S. 614, 620.

The decree must be set aside and the case remanded for the entry of a new decree in accordance with this opinion, with costs to the Company.

IN U. S. CIRCUIT COURT OF APPEALS

AGREEMENT TO STAY MANDATE—Filed March 6, 1923

By agreement the time for the issuance of the mandate herein is extended for 30 days in order to give the parties time to file petitions for writs of certiorari.

Wm. Marshall Bullitt, Attorney for Louis B. Mackenzie. R. A. McDowell, Attorney for A. Englehard & Sons Co.

IN U. S. CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATES—Filed Mar. 7, 1923

Ordered, that motions to stay mandates herein pending applications to the Supreme Court for writs of certiorari, is hereby granted subject to the following condition: that appellant and cross-appellant shall within 30 days from the date of this order file their petitions for the writs in the Supreme Court and, upon giving notice to opposing counsel of date for submission as required by Supreme Court Rule 37, present the petitions in open court on the first motion day thereafter; unless this condition is complied with, or its non-observance sanctioned by the Supreme Court, the mandates herein will issue but in the event of compliance with the condition imposed or of such sanctioned non-observance the mandates will be stayed until final action in the cases is taken by the Supreme Court.

[fol. 61] ORDER EXTENDING TIME TO STAY MANDATE—Filed April 5, 1923

By agreement the time for issuance of the mandate herein is extended for 30 days additional and until May 5th, 1923, in order to give the parties time to file petitions for writs of certiorari.

Wm. Marshall Bullitt, Attorney for Louis B. Mackenzie. R. A. McDowell, Attorney for A. Englehard & Sons Co.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLERK'S CERTIFICATE

I, Arthur B. Mussmann, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Louis B. Markenzie vs. A. Englehard & Sons Company and A. Englehard & Sons Company vs. Louis B. Mackenzie. Nos. 3581-3582, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 19th day of April, A. D. 1923.

Arthur B. Mussmann, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. (Seal of United States Circuit Court of Appeals, Sixth Circuit.)

[fol. 62] WRIT OF CERTIORARI AND RETURN—Filed July 11, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Louis B. Mackenzie is appellant, and A. Engelhard & Sons Company is appellee, No. 3581, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the [fols. 63–65] United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, ss.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 5th day of July, A. D., 1923, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

[Title omitted]

STIPULATION

It is hereby stipulated by counsel for the foregoing parties that the transcript of record already on file in the Supreme Court of the

United States filed therein on the application for a writ of certiorari shall be taken as the return to the writ herein.

A. Englehard & Sons Company, By R. A. McDowell, Counsel.
Louis B. Mackenzie, By Wm. Marshall Bullitt, Counsel.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official signature and the seal of said Circuit Court of Appeals at the city of Cincinnati in said circuit this 9th day of July, A. D., 1923.

Arthur B. Mussman, Clerk United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

[File endorsements omitted.]

[fol. 66] WRIT OF CERTIORARI AND RETURN—Filed July 7, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which A. Engelhard & Sons Company is appellant, and Louis B. Mackenzie is appellee, No. 3582, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the [fol. 67] United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, ss.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled

case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 5th day of July, A. D., 1923, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

[Title omitted]

STIPULATION

It is hereby stipulated by counsel for the foregoing parties that the transcript of record already on file in the Supreme Court of the United States filed therein on the application for a writ of certiorari shall be taken as the return to the writ herein.

A. Englehard & Sons Company, By R. A. McDowell, Counsel.
Louis B. Mackenzie, By Wm. Marshall Bullitt, Counsel.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official signature and the seal of said Circuit Court of Appeals at the city of Cincinnati in said circuit this 5th day of July A. D. 1923.

Arthur B. Mussman, Clerk United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

[fols. 68 & 69] [File endorsements omitted.]

FILED
APR 27 1923
WM. R. STANSBURY

No. 1041 3[redacted]55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

LOUIS B. MACKENZIE, - - - Petitioner,

versus

A. ENGELHARD & SONS CO., - Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the

United States Circuit Court of Appeals

For the Sixth Circuit

AND

BRIEF IN SUPPORT THEREOF.

Where a judicial foreclosure sale has been had pursuant to a decree of a State Court, having jurisdiction of the persons of the parties, it is not competent for a Federal Court, in equity, to refuse to enforce the purchaser's rights acquired at such sale, because it thinks the State Court's action was inequitable.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

A copy of the within Petition for Certiorari and Brief in support thereof, together with a notice that the Petition will be submitted to the Supreme Court of the United States on May 6, 1923, is hereby acknowledged this April 15, 1923.

R. A. McDowell,
Counsel for Respondent.

INDEX.

IN THE

Supreme Court of the United States

October Term, 1922.

LOUIS B. MACKENZIE, - - - *Petitioner,*

vs.

A. ENGELHARD & SONS CO., - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, LOUIS B. MACKENZIE, respectfully petitions for a Writ of Certiorari to review a judgment of the United States Circuit Court of Appeals for the Sixth Circuit, covering both an appeal and a cross-appeal to that Court and which presents a case quite analogous to, and much stronger than, that in which a *certiorari* was granted in *Yazoo & M. V. R. Co.* v. *Clarksdale,* 257 U. S. 10.

The facts are simple and are all stipulated (R. 19).

GENERAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

I. *The necessity of avoiding conflict between the State and Federal Courts and requiring each to respect the judgments of the other.*

1. A State Court having jurisdiction of the person of the defendant, and acting pursuant to the mandate of the highest Court of the State, entered a final decree, giving Mackenzie a judgment against Eschmann on a plain promissory note, and ordering a sale at public auction of 130 shares of stock in order to foreclose a $10,000 lien therein adjudged on the stock, which Eschmann had pledged to secure the payment of the note sued on (R. 36); the public judicial sale was had and Mackenzie bought the stock in for $100;* the sale was confirmed, no exceptions were filed nor any appeal taken, and a Bill of Sale conveying the stock to Mackenzie was executed, approved by the Court, and delivered to Mackenzie as purchaser (R. 25, 38). This gave Mackenzie an unassailable title to the stock (*Yazoo & M. V. R. R. Co.* v. *Clarksdale,* 257 U. S. 10, 26).

*The nominal price realized at the sale did not result from any accident or unfairness or lack of notice; but it arose from the fact that the defendant-debtor, Eschmann, and the corporation, Engelhard Co., through their attorney, publicly notified all prospective bidders at the judicial sale that the certificate for 130 shares of stock about to be sold, had been cancelled, was no longer in existence, and hence valueless. That announcement was made by them pursuant to a carefully thought-out plan designed to prevent any one else from bidding the stock in, and in order to compel the plaintiff, Mackenzie, to become the purchaser, in the belief on the part of Eschmann that they could later nullify Mackenzie's rights as purchaser (R. 24-25, 7, 9).

2. Mackenzie then filed a Bill in Equity in a Federal Court to compel the corporation, Engelhard Co., respondent herein, (1) to issue him a certificate of stock for the 130 shares so purchased or, in the alternative, (2) to pay him the value of the stock and such dividends, stipulated to be about $23,000 (R. 1-5).

3. The Circuit Court of Appeals held that the action of the State Court (1) in decreeing a sale and (2) in confirming the sale made thereunder [without Mackenzie bringing the corporation in as a party to the suit, *the very thing which Mackenzie had, in the first instance, actually done, and which the State Court, at the corporation's own instance, had decided was improper and dismissed it from the litigation*] produced "a grossly inequitable result"; because it permitted Mackenzie not only to own the stock, but after crediting on his debt the $100 paid, left the balance of his claim unimpaired against the judgment-debtor (R. 58); and that the Federal Court, sitting *in equity* (as distinguished from law), had the right to deny to the purchaser some of his legal rights acquired under the State Court's judgment, as a condition of granting him any relief in equity, even though such relief was nothing but a pure money judgment in the nature of damages (R. 57, 59).

Accordingly, the Circuit Court of Appeals declined to recognize or to enforce Mackenzie's rights as the owner of the stock purchased at the

judicial sale; but held that as the corporation, with full knowledge of Mackenzie's claim to a lien as pledgee of the stock, had, at the pledgor's request, during the pendency of the litigation, and before the decree of sale, transferred the stock, *pendente lite,* to the pledgor's wife and attorney (neither of whom were purchasers without notice), the corporation had wronged Mackenzie and was liable to him, but (*a*) not for the *stock itself,* nor (*b*) in damages for the *value* of the stock he had purchased, nor (*c*) for the *dividends* declared thereon after the purchase, but (*d*) only for the original amount of Eschmann's note, with interest, and a part of the costs of the State Court suit—something with which the corporation had no concern and which had been merged in the State Court judgment (R. 59).

It is unnecessary here to consider the erroneous propositions announced by the Circuit Court of Appeals without citation of authority, in order to support its conclusions.

It is sufficient to point out that, if its decision is right, then, whenever a Federal Court shall foreclose a railroad mortgage, sell the property, and by deed convey it to a purchaser, who, desiring to enforce some equitable right arising from the fact of his ownership under such foreclosure decree, brings a suit in a State Court, it leaves the State Court free (under the doctrine now announced) to hold that the Federal foreclosure

sale produced "a grossly inequitable result," and to substitute its own views as to what it will give to the purchaser (admittedly less than his rights under the purchase) as a substitute for the rights established by the Federal decree.

The Federal Court, in effect, denied the full faith and credit to the State Court judgment, which by statute it is required to accord (R. S. 905; *Cooper* v. *Newell,* 173 U. S. 555, 567).

It is highly important that in a case of first impression like this, this Court should determine, as a rule for future guidance, how far a Federal Court (because it thinks a State Court judgment produced an "inequitable result"), can set up its individual ideas of what constitutes an "equitable result," and can compel a litigant to accept such modified rights, instead of receiving full Federal relief based upon a final decree of a State Court.

In *Yazoo* v. *M. V. R. Co.* v. *Clarksdale,* 257 U. S. 10, there was a sale of 250 shares of railroad stock under an execution issued on a Federal Court judgment. Subsequently a State Court, sitting in equity, held that it would compel the purchaser at the Federal Court sale to give up that which it had obtained at the sale and to recognize the original defendant as the owner of the stock. A *certiorari* was issued to the highest Court of the State.

Here the situation is slightly reversed. The sale took place not under an execution, but at a

regular judicial sale confirmed by the State Court itself; and it was a Federal Court, in equity, which denied the purchaser title to the stock, although it did give him partial relief in damages.

II. *The Novelty of the Question. The view taken by the Circuit Court of Appeals is a novel one, indeed so novel that no authority exists on the subject.* Its opinion does not cite a single authority in support of its position, but admitted the novelty of its conclusion, saying (R. 59):

> "We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules."

III. *The Importance of the Question Involved.* A large part of the wealth of the country is represented by corporate stock. Transactions in it are daily and enormous. The pledging of corporate stock for debts is probably the most widespread form of pledge now made.

If a Court having personal jurisdiction of the pledger and pledgee, decrees the sale of corporate stock to satisfy a lien therein adjudged, and a sale thereunder is had, confirmed and a Deed or Bill of Sale given to the purchaser, is it the law that a Court of another jurisdiction, because it does not approve of the first tribunal's judgment, is free under alleged principles of equity jurisprudence, to decline to enforce the

purchaser's rights and arbitrarily *to award him something less,* in order to compensate for the Court's difference of opinion as to the propriety of the first Court's judicial action?

If such is the law, then State Courts will have just as much right to refuse to enforce the supposed inequitable results of Federal decrees, as in the present case a Federal Court has exercised that right with respect to a State Court decree.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

April 15, 1923.

STATE OF KENTUCKY,
COUNTY OF JEFFERSON. }

William Marshall Bullitt, being first duly sworn, says that he is Counsel for Louis B. Mackenzie, Petitioner; that he has read the foregoing Petition for Certiorari; and that the statements contained therein are true.

WM. MARSHALL BULLITT.

Subscribed and sworn to before me by William Marshall Bullitt this 15th day of April, 1923.

M. L. WIEST,
Notary Public, Jefferson Co., Ky.

[See the next page for a short Brief in support of this Petition.]

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1. *The State Court Suit.* Mackenzie, pledgee, sued Eschmann, pledgor, in a Kentucky State Court to recover on a $7,500 note and to foreclose a lien on 130 shares of stock in the Engelhard Co. (worth about $17,000) which Eschmann had pledged as collateral security on his note (R. 20).

The *lower* State Court dismissed Mackenzie's suit, took the pledged certificate away from him and delivered it back to the pledgor, Eschmann (R. 22, 30), who (pending Mackenzie's appeal) procured the Engelhard Co. (which was a "family" corporation and had actual knowledge of the pendency of Mackenzie's claim), to cancel the certificate and to reissue the 130 shares in new certificates to Eschmann's wife and attorney, neither of whom were purchasers without notice (R. 22, 23, 56); this was done in the belief that it would destroy Mackenzie's lien on the stock and defeat his claim thereto, if the case should be reversed (R. 42).

The Court of Appeals of Kentucky *reversed* the case (R. 23-24, 31-36); and, pursuant to its direct mandate, the State Court ordered that the pledged certificate be returned to the Court (which was never obeyed as Eschmann had in the meantime died) and that the 130 shares of stock be sold to satisfy the $10,000 lien adjudged thereon in favor of Mackenzie (R. 24, 36), who,

at such public judicial sale, bought in the stock for $100* (R. 25).

The sale was duly confirmed by the State Court and a judicial deed or bill of sale, transferring and conveying the stock to Mackenzie, was ordered (R. 25); it was duly executed and approved by the Court and was delivered to Mackenzie (R. 25, 38). Mackenzie then presented such Bill of Sale to the Engelhard Co., and demanded that it issue to him a certificate for 130 shares. The Engelhard Co. refused to do so (R. 25).

2. *The Federal Court Suit.* Mackenzie (following the precise course approved in *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, and *Telegraph Co.* v. *Davenport*, 97 U. S. 369) brought an equity suit in the Federal Court against the Engelhard Co. to compel it to issue to him a certificate for 130 shares of stock, or, in the alternative, to pay him the value thereof and the dividends thereon since his purchase at the judicial sale (R. 1-5).

The Engelhard Co. defended upon the ground that as Mackenzie had not superseded the original judgment in the State Court, the Engelhard Co. had (while the judgment remained unreversed) transferred the stock to Eschmann's wife and attorney; that they were now stockholders in the company, which could not lawfully overissue its stock; and hence, that Mackenzie

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*See p. 2, Note, *supra*, for an explanation of the nominal sum at which the stock sold.

had no claim against the corporation for the stock (R. 9, 15).

The DISTRICT COURT held that the Engelhard Co. had *wrongfully* transferred the stock with full knowledge of Mackenzie's pending claim thereto, but it refused to recognize Mackenzie's rights *as owner* through his purchase at the judicial sale; and quite illogically, as it seems to us, gave Mackenzie a judgment in damages against the Engelhard Co., not for the value of the stock, but for (1) the $7,500 note, with interest, and (2) the dividend paid on the stock after the judicial sale—the total judgment amounting to about $15,000 at the present time.

Both parties appealed; Mackenzie seeking to recover for the stock itself or, at least, its stipulated value of $23,000 (R. 47); the Engelhard Co. seeking to avoid all liability whatever (R. 48).

3. *The Decision Complained of.* The CIRCUIT COURT OF APPEALS held:

> (1) That the Engelhard Co. had wrongfully transferred the stock with knowledge of Mackenzie's rights and that if Mackenzie had sued the Engelhard Co. *at law,* he could have recovered full damages from it, *i. e.,* $23,000 (R. 57).
>
> (2) But that as Mackenzie sued *in equity* to recover the stock, the Federal Court had the right to make any relief granted (even though such relief be not the specific delivery of the stock, but nothing but a *pure money judgment* in damages)

"contingent upon plaintiff's acceptance of less than full legal rights" (R. 57, 59); and hence,

(3) That as the Court felt it was "grossly inequitable" for the State Court to have confirmed a sale of $17,000 of stock for $100 —notwithstanding the fact that all parties were present at the sale and that the small price bid was due to the announcement by the authorized attorney of the Eschmann and Engelhard interests, that the sale would carry no title to the thing sold, and to which sale no exceptions were filed nor appeal taken—it would reverse even the District Court's inadequate decree in Mackenzie's favor, and *reduce* the judgment to his original debt and interest (with "the costs of the State Court proceedings up to the time of the decree of the trial court directing a sale, but not thereafter") [R. 58, 59].

It is not necessary here to restate the grounds urged in the Petition for the Writ of Certiorari why this is the kind of a case in which a Certiorari should be granted, but it may be helpful to the Court to have a short

ANALYSIS OF THE OPINION OF THE CIRCUIT COURT OF APPEALS.

I. The Circuit Court of Appeals correctly assumed that Mackenzie acquired the legal title to the stock at the judicial sale and that "in an action *at law* against the corporation for its refusal to reissue the stock to him he would be entitled to recover *full* damages," but the Court *erroneously* holds that as Mackenzie sued the

corporation *in equity*, he cannot recover either the stock or full damages, because of what might be termed Mackenzie's *contributory negligence*, which it expressed in the following words (R. 57):

> "On the contrary, while Mackenzie did not directly acquiesce in the withdrawal of the certificates, he *contributed* to create the situation attending the withdrawal, surrender and reissue. To obtain a *supersedeas* would apparently have been no burden and would have avoided all later complications; and while it may be assumed that the lien upon the stock was in law reinstated *ab initio* when the judgment was reversed, yet the intermediate transfer and reissue would not have occurred if Mackenzie had taken the customary precautions to preserve his interests."

COMMENT: If Mackenzie did not wish to give a *supersedeas* bond, he was absolutely within his rights; and his failure to supersede cannot properly be made the basis by the Federal Court of a refusal to enforce his rights accorded him by the highest Court of the State in reversing the erroneous judgment.

II. The Circuit Court of Appeals held that the wrong done to Mackenzie by the Engelhard Co. in issuing the stock to other persons, pending the appeal, did not wrong Mackenzie (R. 58),

> "to the entire value of the stock, since Mackenzie had therein no interest to be injured except to the extent of his lien."

COMMENT: But the Court of Appeals overlooks the fact that Mackenzie's lien might, if not paid, ripen by its enforcement into the ownership of the entire stock; and that the Engelhard Co.'s wrongful act, if it *deprived* Mackenzie of the complete enforcement of his lien into ownership of the stock, did wrong him to the *full extent* of its value.

III. The Circuit Court of Appeals, while not mentioning the State Court by name, in effect, severely criticized the State Court for entering the decree selling the stock to satisfy the lien, or, in any event, for actually permitting a sale to take place, declaring that *any sale* of the stock would bring about a "grossly inequitable result" and then added (R. 58):

> "The situation could have been easily clarified, *and it was Mackenzie's duty to procure that clarification before going to sale,* if he expected to seek the aid of a court of equity in enforcing his rights as purchaser.
>
> "An appropriate proceeding could have been taken in the equity court where the case was pending, and probably as ancillary or supplemental to that case, whereby it would have been adjudicated, as between Mackenzie, the corporation, Eschmann and the purchasers *pendente lite,* just what title would pass by the expected sale. After such an adjudication the sale would have been fair to all concerned and all suitable equitable enforcement remedies could have been asked without embarrassment."

COMMENT: Probably nothing in the Opinion of the Circuit Court of Appeals more clearly indicates (1) not only its *error,* but (2) its *unjustifiable criticism* of Mackenzie and the State Court than this quotation.

The fact is that when Mackenzie originally filed his suit in the State Court upon the note, seeking to enforce his lien on the stock, he made the corporation, Engelhard Co., a party defendant (R. 20) (the precise thing which the Circuit Court of Appeals criticized him for *not* doing); and the Engelhard Co. procured its dismissal from the suit upon the ground that it was not a necessary or proper party thereto (R. 21). The State Court expressly decided that "Engelhard & Sons Co. are not a party to the transaction and are *unnecessary* parties to the action. That corporation *cannot be proceeded against* until plaintiff [Mackenzie] becomes the owner of the certificate and a new certificate in his name is demanded by him and refused by Engelhard & Sons Co." (R. 21).

As the State Court, having personal jurisdiction over Mackenzie, Eschmann and the Engelhard Co., decided, at the instance of the Engelhard Co., that it was *not* a proper party to the action and could not be sued until after Mackenzie had purchased the stock at the foreclosure sale and had been refused a new certificate, certainly the Federal Court has now no right to say that such decision was wrong and to defeat Mac-

kenzie's claim, upon the ground that he ought to have brought the Engelhard Co. in as a defendant to the State Court suit—the very thing he tried to do and which the State Court held could not be done.

The State Court held that the Engelhard Co. was not a proper defendant to the suit and it was utterly impossible for Mackenzie to have carried out the Circuit Court of Appeals' suggestion that he should have made it a party.

It is difficult to exaggerate the injustice that is done Mackenzie by the Circuit Court of Appeals, in basing its defeat of his rights, upon the ground that he did not do something which he ought to have done, when, in point of fact, he did that very thing, but the State Court held that he had no right to do it—and it is the State Court and *not* the Circuit Court of Appeals which was entitled to decide whether the Engelhard Co. was or was not a proper defendant in the State Court suit.

It might be added, parenthetically, that Eschmann's wife and attorney, to whom he had the stock transferred before the judgment was reversed and pending the appeal, were not purchasers for value, but were *pendente lite* purchasers; that any rights acquired by them under the lower State Court decree were subject to be divested by a reversal; and that when the decree was reversed all such rights were vacated, no State being so rigid as Kentucky is in the en-

forcement of that rule. (*Clarey* v. *Marshall*, 4 Dana, 95, 98.)*

IV The Circuit Court of Appeals went upon the theory (which we will endeavor to demonstrate is totally erroneous) that, sitting in equity, it had the right to revise the judgments of a State Court (which was equally sitting in equity) by holding that when a plaintiff applies for equitable relief to a Federal Court, that Court can exercise its own judgment as to the relief it will grant, if it thinks that a State Court, in equity, did not decide an equity suit as the Federal Court thinks it should have been decided.

In other words, the Circuit Court of Appeals interprets the maxim, "He who seeks equity must do equity" to mean that a Federal Court in administering equitable remedies can convert them into a pure money judgment and then reduce the sum allowed in such an amount as, in the opinion of the Court, will compensate for the amount of wrong or error committed by another equity Court (State Court) in deciding a case properly before it. That this is not an exaggerated statement of the Circuit Court of Appeals' position may be seen from the following quotation in its Opinion (R. 57, 59):

**Kirkland* v. *Trott*, 75 Ala. 321; *Real Estate Sav. Co.* v. *Collonious*, 63 Mo. 290; *Carr* v. *Cates*, 96 Mo. 271, 274; *Dunnington* v. *Elston*, 101 Ind. 373, 375; *Debell* v. *Foxworthy*, 9 B. Mon. 228; *Clark* v. *Farrow*, 10 B. Mon. 446; *Martin* v. *Kennedy*, 83 Ky. 335; *Cook* v. *French*, 96 Mich. 525; *Lord* v. *Hawkins*, 39 Minn. 73, 76; *Smith* v. *Burns*, 72 Miss. 966; *Harle* v. *Langdon*, 60 Tex. 555.

"It is fundamental that a plaintiff who does not rely upon his strict legal rights but asks special relief from a court of equity, subjects himself to the equitable discretion of that Court, and may be denied some measure of his legal rights if to grant them all would be distinctly inequitable. * * * The rule which shapes the relief given by a court of equity in circumstances where equitable considerations make that relief contingent upon plaintiff's acceptance of less than full legal rights, must vary in its application with every case. We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules.

"We therefore conclude that as against the corporation, which in some measure represents its stockholders of record, and for the purpose of the decree which the court below, sitting in equity, ought to have rendered, it must be considered that at the time of plaintiff's demand upon the corporation for a transfer of stock, *he had only a lien for his debt and interest,* so that his measure of damages against the corporation in this equitable proceeding should be *limited* to the amount necessary to discharge such lien. The lien would, we think, include the costs of the state court proceedings up to the time of the decree of the trial court directing a sale, but not thereafter."

COMMENT: The Circuit Court of Appeals, ignoring the fact that Mackenzie's lien on the stock had, by the State Court sale, disappeared as a lien and had been converted into a legal title to the stock itself, argued that "at the time of plaintiff's demand upon the corporation for a transfer of stock," which was many months *after*

the sale and the confirmation thereof, he "had only a *lien* for his debt and interest." Is not that a case of a Federal Court absolutely disregarding a State Court judgment and attempting to say that, long after the State Court had wiped out the lien and converted it into a title, that, nevertheless it still remained "only a lien"?

CONCLUSION.

The monetary loss to Mackenzie as the result of the decision of the Circuit Court of Appeals, while very considerable to him, is, after all, of course, no reason for the granting of a Certiorari.

But it would seem as if this case was one in which it was eminently proper, indeed, if not required, that a Certiorari should issue, in order that some authoritative rule be laid down for the guidance of State and Federal Courts alike, as to how far either, when sitting in equity, may assume a more or less arbitrary power to compel a litigant to give up that which he had fairly acquired in a Conrt of another jurisdiction, as a condition of obtaining relief, according to well established equitable principles, in the other forum.

Even at the risk of repetition, it must be insisted that a Federal Court, in equity, is not entitled to decide a case according to the individual ideas of what the result should be, but that it is bound by the fixed principles of equitable juris-

prudence, one of which is that it must give to the judgment of a State Court, having personal jurisdiction of the parties, the same effect as to the rights arising therefrom, as would be accorded by the judgment in the State where rendered; and, furthermore, that even if the Engelhard Co. desires to avail itself of the maxim that if Mackenzie seeks equity he must do equity, still the Engelhard Co. *must not have conducted itself in such a manner, or have placed conditions and circumstances around Mackenzie, that would make it inequitable for the Engelhard Co. to avail itself of the maxim.*

But for the wrongful act of the Engelhard Co. no damage would have occurred to Mackenzie, and hence no cause of action would have arisen; and to permit the Engelhard Co. to set up this defense would be to give it an unjust advantage by reason of its own wrong. (1 Story's Equity Jurisprudence, 14th Edition, Section 74.)

The Engelhard Co., whose president was Eschmann's brother-in-law, committed the first wrong by disregarding its full knowledge of Mackenzie's pending claim, and, combining with Eschmann to defraud Mackenzie, transferred the stock to Eschmann's wife (Engelhard's sister) and attorney (also Engelhard's attorney), from which latter Engelhard himself purchased back the stock so transferred (R. 22, 23).

When the Engelhard Co. injected itself, as a volunteer, into the controversy between Mac-

kenzie and Eschmann, and loaned its aid to assist Eschmann to defeat Mackenzie's lien, it did so at its peril; and when the Kentucky Court of Appeals reversed the judgment, all intermediate transfers to purchasers *mala fides* were vacated.

The Circuit Court of Appeals should not be permitted to substitute its views for those of the State Court as to the nature of the proceedings which should have been taken in the State Court or as to the propriety of the judgment therein rendered.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

April 15, 1923.

WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

Nos. 55, 59.

LOUIS B. MACKENZIE, - - - - - - *Petitioner,*

vs.

A. ENGELHARD & SONS CO., - - - *Respondent.*

A. ENGELHARD & SONS CO., - - - - *Petitioner,*

vs.

LOUIS B. MACKENZIE, - - - - - - *Respondent.*

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR LOUIS B. MACKENZIE.

A Federal Court has no right to disregard a final judgment of a State Court because the Federal Court thinks it produced a "grossly inequitable result" and to substitute therefor the Federal Court's conception of what the State Court should have done.

SAMUEL B. KING,
WM. MARSHALL BULLITT,
Counsel for Louis B. Mackenzie.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

AUTHORITIES.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR LOUIS B. MACKENZIE.

These writs of *certiorari* involve the liability of the Engelhard Co. for 130 shares of its capital stock, which it transferred on its books to a *pledgor's* wife and attorney with full knowledge that Mackenzie, as *pledgee,* claimed to be (as was subsequently *established by a judicial decree*) entitled thereto.

* * * * *

A State Court, having personal jurisdiction of the parties, foreclosed Mackenzie's lien, had a judicial sale of the stock, confirmed the sale to Mackenzie as purchaser thereat, and executed a Bill of Sale therefor.

Mackenzie then sued the corporation for the stock. The DISTRICT COURT (EVANS, J.) held the Engelhard Co. liable for only $13,254.75 (the amount of the original $7,500 debt, with interest and one dividend added) instead of $23,160.15 (the stipulated value of the stock plus two dividends thereon) (R. 36). Both parties appealed (R. 36-38).

The CIRCUIT COURT OF APPEALS *reversed* the District Court, held that the State Court's decree produced "a grossly inequitable result," and *reduced* Mackenzie's recovery to his original $7,500 debt and interest, to wit, $11,892.50, thereby depriving Mackenzie of any benefit of his purchase at the judicial sale (R. 44, *Mackenzie* v. *Engelhard & Sons Co.*, 286 Fed. 813, 817). Both parties obtained writs of *certiorari* (262 U. S. 739).

The facts are all stipulated (R. 14-20, 34).

There are just two questions of law presented: *First,* did Mackenzie acquire title to the stock at the judicial sale? and, *Second,* if so, can a Federal Court refuse to enforce his title, because it disagrees with the State Court's action in selling the stock to him?

STATEMENT OF THE CASE.

1. Mackenzie's original demand that the certificate of stock be transferred to himself as pledgee. In 1912, Mackenzie owned a $7,500 collateral note, executed by one Eschmann, which note recited on its face that there was deposited therewith as collateral security "Certificate of Stock No. 24 for 130 shares of the capital stock of A. Engelhard & Sons Co.," but the stock certificate (which stood in Eschmann's name) had not been actually endorsed in blank (R. 15).

On December 10, 1912, Mackenzie presented the note and stock certificate to the Engelhard Co. (through its President, V. H. Engelhard) and demanded that the stock be transferred to his name *as pledgee,* but the company refused to do so because the certificate itself was not endorsed in blank (R. 15, 17).

2. The State Court suit to enforce Mackenzie's lien on the stock. Shortly thereafter (March 10, 1913) Mackenzie filed suit in the State Court at Louisville, Ky., against Eschmann and the Engelhard Co., to recover on the note and to enforce his lien on the stock (R. 15).

At the instance of the Engelhard Co., the lower court dismissed the suit against it as an unnecessary party to the litigation, holding that the Engelhard Co.

> "cannot be proceeded against until plaintiff becomes the owner of the certificate and a new cer-

> tificate in his name is demanded by him and refused by Engelhard Co." (R. 15, 16);

and, on final hearing, decided that Mackenzie was not a *bona fide* holder, dismissed his petition, and adjudged that the maker of the note, Eschmann, might withdraw the stock certificate from the Court files where it had been filed as an "Exhibit" with Mackenzie's petition (R. 22, 30, 31).

Mackenzie immediately appealed to the Kentucky Court of Appeals (R. 7, 23); but he did not supersede the judgment which permitted Eschmann to withdraw the stock certificate from the Court files (R. 17).

3. How Eschmann obtained physical possession of the pledged stock certificate. Some months later and during the pendency of the appeal, Eschmann (acting under the permission given in the decree) withdrew from the Court files the stock certificate, No. 24 for 130 shares, executed a power of attorney to transfer it, presented the stock certificate and power of attorney to the Engelhard Co. (of which his *brother-in-law* was President), and, at his request, the Engelhard Co. marked the old certificate "cancelled," split it up into two new certificates, issued and delivered them as follows (R. 17):

	Shares
(*a*) To R. A. McDowell, attorney at law for Eschmann, for Engelhard Co. and for Mrs. Eschmann 25 shares; and McDowell then sold and transferred the 25 shares to Eschmann's brother-in-law, V. H. Engelhard, President of the Engelhard Co., who knew all the relationships of the parties to the transaction and of Mackenzie's claim to the stock.	25
(*b*) To his wife, Mrs. Eschmann, who still holds the certificates therefor	105
Total shares	130

No record of the transfer from husband to wife was made as required by Ky. Stat., §2128.

This entire transfer was secret and was not known to Mackenzie until *over six years thereafter.*

4. Kentucky Court of Appeals reversed the lower court and upheld Mackenzie's claim to the stock. The Kentucky Court of Appeals *reversed* the judgment below, and decided that Mackenzie was entitled to recover the full amount of the note with interest, and to enforce his lien on the stock (R. 18, 24-28; *Mackenzie* v. *Eschmann's Ex'trs.*, 174 Ky. 450).*

5. Final decree of the State Court awarded the 130 shares stock to Mackenzie. In accordance with the mandate of the Kentucky Court of Appeals, the lower court vacated its prior decree and

*Eschmann died during the appeal and the action was duly revived against his wife, *et al.*, as Executors (R. 18).

entered a new one, wherein it adjudged (R. 18, 28, 29):

1. That Mackenzie recover $7,500 with interest and costs from Eschmann's Executors—one of whom was his wife, Mrs. Eschmann, who held and still holds 105 shares of the stock.
2. That, to secure the payment of the judgment, Mackenzie had a lien on the 130 shares of Engelhard Co. stock, and on any certificates which had been or might thereafter be, issued by Engelhard Co. to the Executors in lieu of the original certificate; and that the Executors return to the Court the certificate No. 24, withdrawn from its files.
3. That "said shares of stock" be sold free of all liens to satisfy Mackenzie's claim.

As the Executors were non-residents of Kentucky, the Court could not enforce its decree requiring a return of the certificate (R. 18).

Pursuant to that final decree, the judicial sale was duly advertised, held, confirmed, and a bill of sale acknowledged, executed and delivered by the Court to Mackenzie conveying to him the 130 shares of stock in the Engelhard Co., which, on July 15, 1918, he had purchased at such judicial sale thereof (R. 8, 19, 29-31).*

The final decree, order of confirmation, etc., were never appealed from and are the final and conclusive judgments of the State Court.

*The sale was had on July 15, 1918, during vacation, and consequently was not confirmed until October 30, 1918; and the Bill of Sale was actually delivered to Mackenzie on December 7, 1918 (R. 19, 31).

Mackenzie thus acquired lawful title to the 130 shares.

The Engelhard Co. paid cash dividends on the stock to Mrs. Eschmann and Mr. Engelhard, as follows (R. 35):

Nov. 30, 1918, 25%	$3,250.00
Nov. 30, 1919, 18%	2,340.00
Dividends	$5,590.00

6. Mackenzie's unsuccessful efforts to obtain the stock from the Engelhard Co. On April 29, 1919, Mackenzie presented to the Engelhard Co. a certified copy of the Bill of Sale, and demanded a certificate for 130 shares, which was refused. Mackenzie was still kept in ignorance of the fact that the stock had been transferred to Mrs. Eschmann and Mr. Engelhard.

7. Institution by Mackenzie of the present suit in the Federal Court to compel the Engelhard Co. to issue, or pay the value of, the 130 shares. On July 3, 1919, Mackenzie (following the precise course approved in *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, and *Telegraph Co.* v. *Davenport*, 97 U. S. 369), filed the present suit in the Federal Court at Louisville, against the Engelhard Co., alleging substantially the facts herein above set out (which were all later stipulated to be correct, R. 14-20), and seeking (R. 4):

1. Delivery of a certificate for 130 shares; or,
2. If a new certificate could not be lawfully issued, a judgment for the value of the

stock (stipulated to be $16,900 (R. 34) and for the dividends declared since the sale on July 15, 1918 (stipulated to be $5,590, R. 35).

The defense set up by the Amended Answer (R. 11-14) was (1) that as Eschmann had gotten possession of the original certificate under the first decree below and presented it to Engelhard & Co., who had issued new certificates therefor (still concealing the names of such transferees), it could not lawfully issue new certificates to Mackenzie for the same stock; and (2) that the subsequent decree in the State Court was void because the Court did not have physical possession of the certificate and, hence, could not decree a sale thereof.

8. Decision of the District Court. The District Court held that Eschmann had speedily "split up" the 130 share certificate, in favor of his wife and his attorney, in order to defeat any relief to Mackenzie if the State Court judgment should be reversed; that the Engelhard Co. knew all about the controversy over the stock and Mackenzie's claim thereto, and that any transfer of the stock which it made, with that knowledge, was at its peril; that it should have refused to transfer it pending the appeal or demanded a bond of indemnity; and that it was liable to Mackenzie (R. 31-34).

The District Judge who, as an old Kentucky practitioner, was thoroughly familiar with the

law of Kentucky regarding appeals and *supersedeas*, said (R. 32, 33):

> "All of the persons who got portions of the 130 shares of the defendants' capital stock when Certificate #24 was 'split up,' may have confidently thought that the early action of the State Court sustaining the demurrer of A. Engelhard & Sons Company to the petition therein pending would prevent any further trouble as to those shares, and they may all have been confident that that action of the State Court would be approved upon appeal, but that confidence or assumption or belief would not, as matter of law, relieve them of any obligation in respect to that 130 shares which might be made clear by any reversal of the judgment of the Jefferson Circuit Court.
>
> "*Prima facie* it made no difference to the defendant corporation what individuals became the holders of its capital stock, and that particular question was not of itself of any special moment to it, but it was a matter of prime importance to the defendant as to whether it should wrongfully and with such knowledge of the facts, issue certificates for that 130 shares of stock to others than those who might ultimately be held by the State Courts to be entitled to it.
>
> "Especially cannot the defendant very persuasively urge the argument necessary to support its contention when this stock was used first to pay to the attorney a $2,500 fee in that litigation and when the other 105 of the 130 shares were delivered to other persons who were of kin to the president of the company. Those things, *per se*, might not have been in any way wrong, but they seem to have presented a temptation to speedy action in order to set up a barrier to plaintiff's claims. * * *
>
> "The fact that the judgment was not superseded did not in any way alter the obligation of the defendant to see to it that the 130 shares of

stock evidenced by Certificate #24 should be kept in condition to meet any duty or obligation devolving on the corporation when final judgment should ultimately be rendered by the State Courts, and as the mere distributor of certificates of the stock to those entitled, defendant should have kept the situation intact, so as to meet the requirements of any judgment in the litigation in the State Court. And for its own safety it might have demanded indemnity before it acted.

"*Prima facie*, as we have said, it was a matter of indifference to the defendant corporation as to who should hold the title to its stock, but if, having notice of the facts, it participated (as was done here) in the giving of certificates of that stock to persons other than those who were entitled thereto, it could not thereby deprive plaintiff of his rights to the stock in the corporation.

"In short, under the circumstances, the defendant having full notice of the facts, it was its duty not to transfer that stock to anybody except under the judgment of the court. Until that judgment was finally rendered it was its duty, as well as its right, to preserve the status so that it might be able to meet the requirements of whatever judgment might be rendered. Its failure to do that subjects it to a liability to the plaintiff, and the fact that the fee of Mr. McDowell was due from whoever employed him did not support a conclusion that that fee could be paid out of stock ultimately to be adjudged to be owned by some other stockholder than the debtors of the attorney."

The District Court then very illogically held that Mackenzie should recover from Engelhard, not the value of the stock which Mackenzie had bought at the judicial sale, but (1) the amount of Mackenzie's original debt of $7,500 with interest from July 25, 1911, to December 7, 1918 (the date

of the judicial bill of sale to Mackenzie), *plus* (2) the 18% dividend subsequently declared, November 30, 1919, with interest to the date of the decree —a total of $13,354.75 (R. 36).

Mackenzie appealed from the failure to give him the *full value* of the collateral he bought in (R. 36-37).

Engelhard & Co. appealed from the decree holding it liable for *anything* (*Id.*).

9. The Circuit Court of Appeals' decision. The CIRCUIT COURT OF APPEALS not only denied to Mackenzie (as did the District Court) any relief as *owner* of the stock acquired at the judicial sale, but it went further and denied him the right to the 18% dividend paid November 30, 1919 (which the District Court had allowed him); it reversed the decree and limited Mackenzie's recovery to his *original debt* and interest—thereby absolutely ignoring the State Court judicial sale as completely as if it had never occurred (R. 44).

The CIRCUIT COURT OF APPEALS (without the citation of a single authority on any proposition) held:

(1) That the foreclosure sale was completely valid as against Eschmann (pledgor) and his wife and attorney (*pendente lite* purchasers): and that Mackenzie acquired the legal title to the stock, so that "in an action *at law* against the corporation for its refusal to re-issue the stock to him, he [Mackenzie] would be entitled to recover *full damages*" (R. 42).

(2) But that as Mackenzie sued *in equity* to recover the stock or its value, the Federal

Court has the *"equitable discretion"* to make any relief granted (even though such relief be not the specific delivery of the stock, but a *pure money judgment* in damages) "contingent upon plaintiff's acceptance of *less* than full legal rights" (R. 42, 44).

(3) That Mackenzie ought to have superseded the lower State Court judgment (R. 42); but not having done so, he was under an "equitable obligation to clear up the title before proceeding to sale"; and after the State Court entered a decree of foreclosure, he ought to have refrained from having the sale proceed, and should have made the Engelhard Co. and the wife and attorney parties to the suit by supplemental proceedings, in order to determine what title would pass by the sale (R. 43)—notwithstanding the fact (*a*) that he had originally made the Engelhard Co. a party defendant to the foreclosure suit, and it had secured its dismissal as an unnecessary party (R. 15, 16); (*b*) that he did *not even know* of the transfers for nearly three years after the sale; (*c*) that the wife and attorney were both purchasers *with* notice, and the wife at least *without* value (R. 17, 19, 41); and (*d*) that the Court of Appeals apparently concedes the foreclosure sale was valid and passed a good title to Mackenzie (R. 42).

(4) That the Court of Appeals felt it was *"grossly inequitable"* for the State Court to have confirmed a sale of $17,000 of stock for $100—notwithstanding the fact that all parties were present at the sale and that the small price bid was due to the announcement by the authorized attorney of the Eschmann and Engelhard interests, that the sale would carry no title to the thing sold, and to which sale no exceptions were filed nor appeal taken (R. 43, 49).

(5) That in order to correct what it deemed to be the State Court's "grossly inequitable result," the Federal Court sitting *in equity* (as distinguished from law) would exercise its "equitable discretion" to deny Mackenzie his full legal rights and to give him such *lesser* rights as would, in its opinion, *when computed on a money basis*, serve to correct the alleged inequitable action of the State Court.

Is it possible that a Federal Court has the power to disregard legal rights acquired under State Court suits—not because the State Court procedure was void—but because it does not accord with the Federal Court's idea of how the suit should have been decided on the merits?

The Court of Appeals erred in its conception of the function of the general equitable principle that the relief granted may be less than the legal rights. That principle can not be utilized to enable a Federal Court to disregard rights and titles acquired under valid State Court decrees, in order to conform such rights and titles to what the Federal Court thinks the State Court should have done.

Suppose a Federal Court had sold a railroad under foreclosure. Would a State Court be heard to say that it would disregard the purchaser's title so acquired, and merely grant him a lien for his purchase price, while restoring the property to the original owner, because the State Court felt the Federal decree produced a "grossly inequitable result"? Certainly not.

ASSIGNMENTS OF ERROR.

The respective assignments of error raise the question of the extent, if any, of the Engelhard Co.'s liability to Mackenzie (R. 36-37).

SUMMARY OF POINTS DISCUSSED.

1. **Mackenzie became the full legal owner of the 130 shares of stock, as purchaser at a valid judicial sale, duly confirmed by the State Court.**

   The prior transfer of the stock to Eschmann's wife and attorney did not defeat Mackenzie's title at the judicial sale.

   Any rights acquired by Eschmann or by his wife or attorney through him, under the lower State Court original decree were subject to be divested by a reversal; and when the decree was reversed, all such rights were vacated.

2. **The Engelhard Company was liable to Mackenzie for refusing to transfer to him the 130 shares of stock.**

3. **Mackenzie is entitled to recover from the Engelhard Company, either:**

   (1) The 130 shares of stock and all dividends declared since October 30, 1918; or

   (2) The agreed value of the stock as of October 30, 1918, plus the dividends subsequently declared thereon.

4. **The Circuit Court of Appeals erred in limiting Mackenzie's recovery to his original $7500 debt and interest.**

FIRST POINT.

Mackenzie became the full legal owner of the 130 shares of stock, as purchaser at a valid judicial sale, duly confirmed by the state court.

The prior transfer of the stock to Eschmann's wife and attorney did not defeat Mackenzie's title at the judicial sale.

Any rights acquired by Eschmann, or by his wife or attorney through him, under the lower State Court original decree were subject to be divested by a reversal; and when the decree was reversed, all such rights were vacated.

Both the District Court (R. 7, 33, 35) and the Circuit Court of Appeals (R. 42) correctly assumed that the State Court judicial sale was valid and that Mackenzie acquired title to the stock, the Court of Appeals saying (R. 42):

> "We have no doubt that, in spite of the withdrawal of the certificate from the court files, the State Court retained jurisdiction over the subject matter sufficiently to decree a foreclosure sale valid as between the parties, and for the purpose of this opinion, and without undertaking to decide the questions involved, we assume that the foreclosure of the lien upon the stock was so completely valid that, as against both Eschmann and purchasers *pendente lite*, Mackenzie acquired the legal title to the stock."

We submit:

1. *Mackenzie became the full legal owner of the 130 shares of stock, as purchaser at a valid judicial sale, duly confirmed by the State Court.*

The validity of Mackenzie's title to 130 shares of stock is *res judicata.* The State Court had both parties, pledgor and pledgee, personally before it, had physical custody of the stock certificate, and ultimately decided that Mackenzie had a valid lien on the stock; it gave a personal judgment, ordered a judicial sale of the stock to satisfy such judgment, and the sale was duly held, at which all parties were present or represented; Mackenzie became the purchaser, the sale was confirmed, and a regular Bill of Sale by the Court's Commissioner was ordered, executed and approved, and delivered to Mackenzie, thereby transferring to him all of the title of Eschmann, his estate, and the other parties to the suit (R. 18, 19, 28-31).

The Validity of the State Court Judicial Sale.

1. In response to the Engelhard Co.'s contention (R. 14) that the State Court's final decree on October 31, 1917 (R. 28), was absolutely void because at the time of its rendition the Court did not have the actual physical custody of the stock certificate, we need only respond:

(*a*) Having both parties personally before it, the State Court had jurisdiction to give a valid

judgment on the note in favor of Mackenzie and against Eschmann's executors.

(*b*) The Court could certainly adjudge that Mackenzie had a lien on the shares of stock which had been pledged to secure the payment of the note.

A certificate of stock is mere *evidence* of the ownership of stock. It is not the stock itself. Eschmann had pledged the shares of stock, evidenced by the certificate, to secure the debt. The Court could adjudge a lien on the shares of stock without having the physical custody of the certificate itself. The Court originally had possession of the physical certificate, but had erroneously surrendered it to Eschmann under the original judgment. When that judgment was reversed, and Eschmann's executors were decreed to return the certificate to the Court (R. 29), their failure so to do could not affect the power of the Court to adjudge a lien upon the stock to secure the payment of the note on which it was pledged.

In *Sprague* v. *Cocheco Mfg. Co.,* Fed. Cases 13249, the stock stood in the name of a Trustee. A State Court removed the Trustee, directed him to transfer the estate to a new Trustee, and the Court's Master in Chancery assigned the stock to the new Trustee, but without ever receiving the stock certificate from the old Trustee. The old Trustee negotiated the certificate to innocent holders for value, who brought suit in the Federal

Court against the corporation to compel their recognition as stockholders.

The Federal Court held that the State Court had full jurisdiction, by decree, to transfer the title of the stock to the new Trustee notwithstanding the certificate was outstanding; that the transfer to the new Trustee was valid, was a full protection to the corporation, and that the corporation could not be compelled to account to the holders of the certificate acquired from the old Trustee. The case is in point because it squarely decided that the State Court could transfer the title from the old Trustee to the new Trustee, notwithstanding the certificate was outstanding and never brought into the Court.

The Court aptly said:

> "It is sufficient, for the decision of the case, that I should say, that the decree of the Court in Massachusetts, and the assignment there made by the Master in Chancery is a full protection to the defendant against a claim made by the plaintiffs, under a transfer to them after such decree and assignment, unless they show, that before such decree, the person from whom they claim, and to whom they advanced their money, had acquired from the former Trustee a title which was good as against his successor. This they have not shown."

If the rights of any innocent *bona fide* purchasers for value had arisen, through successive intervening purchases of the 130 shares of stock pending the appeal, certificates for which had been successively turned into the corporation, can-

celled and new certificates issued, a serious question would arise as to the protection of such ultimate holders of the stock; in which event Mackenzie's remedy might be exclusively one for damages against the corporation. *But no such question arises,* as there has never been any subsequent transfer of the stock. It stands in the name of the original transferees and no rights of *bona fide* purchasers for value, without notice, have arisen.

Nor do any such considerations affect the validity of the State Court's judgment under which the stock was sold to Mackenzie. Mackenzie is protected in his purchase by all the principles governing judicial sales.

2. The Engelhard Co. contends that the State Court judgment, decreeing a lien on the stock and selling the stock, was void because: (1) the certificate had *never been endorsed,* and hence could not be pledged by delivery; (2) the lien was lost when Mackenzie, under order of Court, *surrendered possession* of the certificate to the Clerk of the Court; (3) the Commissioner of the Court when making the sale *did not have physical possession* of the thing sold; (4) at the time of the judicial sale a new certificate had been issued to Eschmann's wife and attorney; (5) that neither the judgment, Commissioner or bill of sale acted upon a sufficiently specific thing.

In response it is sufficient to observe that neither the judgment, order of sale, or order of

confirmation, was ever appealed from, and that the judgment *cannot be collaterally attacked here.*

Whether (*a*) a lien could be created by pledging a certificate of stock *without endorsing it in blank,* or (*b*) the *compulsory surrender of the possession* of the pledged thing under order of Court *destroys the lien,* or (*c*) a Court's Commissioner must have *physical possession* of the thing sold at the time of the sale, or (*d*) corporate stock could be sold and a bill of sale made therefor without having the mere evidence thereof in the shape of the stock certificate present—were all matters which, whether decided rightly or wrongly, could only affect the *correctness* of the judgment and *not its validity.* As Eschmann did not appeal, and the time for the appeal has long since expired, it must be assumed by this Court that the State Court's judgment represents a final adjudication as to the rights between Mackenzie and Eschmann and is not open to be collaterally attacked here.

3. The Engelhard Co. proceeds upon the theory that the 130 shares of capital stock *and* the particular certificate No. 24 which at one time evidenced those shares of stock *are one and the same thing.* Such is not the law. It is well settled that shares of stock exist *independently* of any certificate as evidence thereof. (*Pacific National Bank* v. *Eaton,* 141 U. S. 227, 233-4; *Commonwealth* v. *Peebles,* 134 Ky. 121, 126.)

Eschmann pledged to Mackenzie the 130 shares of stock not merely by the delivery of the stock

certificate, but by signing and delivering a promissory note which expressly recited that there was deposited therewith as collateral security the certificate for 130 shares (R. 15). This made, as between the parties, a perfectly valid pledge of the stock even though the certificate were not endorsed in blank. (*First National Bank* v. *Bowman,* 168 Ky. 433, 435.)

The Engelhard Co. always treats the *certificate* of stock No. 24 as if *it* were the thing which the State Court *ordered* sold, *actually* sold and then *conveyed.* It omits the important part of the decree, order of confirmation and bill of sale which respectively provide that Mackenzie had a lien "upon said 130 shares of stock *represented* by said certificate" and that there should be a sale of "the *said 130 shares* of capital stock" and that "*said shares* of stock shall be sold" and that there was conveyed to Mackenzie "the *said 130 shares* of the capital stock of the A. Engelhard & Sons Co. hereinabove described" (R. 28-31, 19).

It is thus seen that what the State Court undertook to do was *not* primarily to sell certificate No. 24, but was to sell 130 *shares* of stock which had been *evidenced* by certificate No. 24. The 130 shares of stock in controversy existed independently of the certificate. It was that particular 130 shares of stock which Eschmann pledged to Mackenzie, which Mackenzie held as pledgee, which the Court finally gave a lien upon, which was sold and which he purchased.

In the State Court, Eschmann, the then owner of the 130 shares of stock, *was a party and personally appeared.*

The Court certainly had jurisdiction to decide whether there was a valid pledge of the stock as between the parties. It did decide that point and it sold those particular 130 shares of stock. Notwithstanding the Engelhard Co.'s cancellation of certificate No. 24 pending the appeal, the particular 130 *shares* of stock remained in existence, was specifically identified, and was sold by the Court.

2. *The prior transfer of the stock to Eschmann's wife and attorney did not defeat Mackenzie's title at the judicial sale.*

During the pendency of Mackenzie's appeal in the Kentucky Court of Appeals, the Engelhard Co., with full knowledge of all the facts and of Mackenzie's claim, secretly transferred the 130 shares to Eschmann's wife and attorney—evidently because the President of the Company desired to assist his sister, his brother-in-law, and his own attorney, in defeating the possibility of Mackenzie ever collecting his debt in the event of a reversal (R. 17, 32, 33).

(*a*) *105 shares transferred to Mrs. Eschmann.* Mr. and Mrs. Eschmann were husband and wife, and so known to be to her brother, V. H. Engelhard, President of Engelhard Co. (R. 17).

Ky. Stat., §2128, provides:

> "A gift, transfer or assignment of personal property between husband and wife shall not be valid as to third persons, unless the same be in writing, and acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded."

Eschmann never acknowledged or recorded the transfer to his wife (R. 18).

In *Eberhardt* v. *Wahl,* 124 Ky. 223, 227, it was held that the transfer of corporate stock between a husband and wife was subject to the provisions of §2128, and was void unless recorded as chattel mortgages are required to be recorded. (See also *Jones* v. *Lou. Tob. Whse. Co.,* 135 Ky. 824.)

The Engelhard Co. suggests that the Eschmanns were residents of New York and hence not bound by the Kentucky statute. There is no evidence in the record that they were residents of New York at the time of the transfer. It is immaterial any way because the transfer of the capital stock of a Kentucky corporation must be determined by the law of Kentucky. (See *Citizens S. & P. Co.* v. *Ill. Cent. R. R.,* 205 U. S. 46, 57; *Shaw* v. *Goebel Brew. Co.,* 202 Fed. 408; *Horton* v. *Sherrill, etc., Co.,* 147 Ky. 226, 229.

The transfer to Mrs. Eschmann was absolutely void and the Engelhard Co. knew it was void.

Furthermore, she was, in no sense, a purchaser for value or without notice. She has never asserted any claim to the stock, so far as the record discloses. Therefore, the Engelhard Co. cannot avoid its present duty to transfer the stock to

Mackenzie, by saying that Mr. Eschmann had already transferred it to his wife—as such a transfer was void.

(*b*) *25 shares transferred to R. A. McDowell.* Mr. McDowell, as attorney for the Eschmanns and the Engelhard Co. in the State Court case (both lower and appellate courts), had *full knowledge* of Mackenzie's claim; and in taking the transfer of the 25 shares to himself, he did so subject to any reversal that might be had of the decree on which Eschmann's title to the stock depended (p. 27, *infra*).*

So, neither of the persons, to whom the Engelhard Co. permitted the stock to be transferred, were innocent purchasers for value; but (1) the transfer to the wife was both without value, and void under the statute, while (2) the transfers to McDowell and Engelhard were with full notice of Mackenzie's claim, pending on appeal (R. 41).

It is further argued that Eschmann might have endorsed the stock and delivered it to his wife and McDowell (without having it first transferred to them on the corporate books) and invested them with a perfect title. This is an error. Corporate stock is not negotiable (*Hammond* v. *Hastings,* 134 U. S. 401, 404). Any transferee, especially with notice or without value, who took the stock

*Likewise, V. H. Engelhard (to whom McDowell sold the 25 shares) had full knowledge of Mackenzie's claim, not only because he was the President and chief executive officer of the Engelhard Co., who was a defendant to Mackenzie's suit, but especially because Mackenzie had, before suing in the State Court, presented the note, and stock to Engelhard personally and demanded the transfer of the stock. [Cf. R. 15 (2, 3) R. 17 (9a, b).]

from Eschmann would have taken it subject to Mackenzie's rights thereto.

(*c*) *Stock certificates are not negotiable as to the first transferees.* Furthermore, stock certificates are not negotiable instruments (2 Cook on Corporations, 7th Ed. §§411-415, 437; 1 Machen's Modern Law of Corporations, §842), and even if Mrs. Eschmann and McDowell had, in good faith and without actual knowledge, bought the stock from Eschmann, they would have taken it subject to Mackenzie's claim; and when his lien was finally established by the Court of Appeals and the stock sold, their rights were subordinate to that lien. (*Church* v. *Citizens St. Ry.,* 78 Fed. 526, 530; Fletcher, Cyc. of Corporations, §3779.)

In *Hammond* v. *Hastings,* 134 U. S. 401, a Michigan corporation was, by the general laws of that State, given a lien upon the stock of its stockholders, for any indebtedness owing to it.

A person in Illinois bought stock in ignorance of the prior owner's indebtedness to the corporation. It was held that the corporation had a prior lien on the stock; and that the purchaser took the stock *subject* to such lien, although at the time of purchase ignorant that there was any lien or indebtedness against it.

The Court said (p. 404):

> "Repeated efforts have been made to have certificates of stock declared negotiable paper,

but they have been unsuccessful.* Such a certificate is not negotiable in either form or character; and, like every non-negotiable paper, whoever takes it does so subject to its equities and burdens; and though ignorant of such equities and burdens, his ignorance does not relieve the paper therefrom or enable him to hold it discharged therefrom."

If a corporation's lien could not be displaced by a transfer of the certificates to an innocent purchaser for value (who was wholly *ignorant* of the existence of the indebtedness creating the lien), *a fortiori* Mackenzie's lien could not be destroyed by a transfer of the certificates to Eschmann, pending the final decision of the Court as to the existence of the lien; nor to Mrs. Eschmann or McDowell, neither of whom were *bona fide* purchasers for value.

Even if this were a contest between Mackenzie on the one hand, and Mrs. Eschmann and McDowell on the other, Mackenzie's rights would be superior; and especially so as, in the one case, (1) there was *no consideration* and, (2) by statute, the transfer was *void,* while, in the other, (3) there was *full knowledge* and no consideration except the payment of a past debt (fee).

The fundamental error underlying the Engelhard Co.'s course in this entire matter, was its assumption that upon Eschmann's voluntary pres-

*In every case where a holder of stock certificates has been protected in his ownership as against the true owner, it has not been because the stock was negotiable, but because the true owner was in some way estopped to dispute the subsequent holder's title. There is no element here of estoppel against Mackenzie.

entation to it on February 20, 1915, of certificate No. 24 for 130 shares duly endorsed, it had the right to ignore its knowledge of Mackenzie's claim and his pending appeal, and transfer the stock as Eschmann desired.

Such is not the law governing a corporation's duty to its shareholders or those claiming to be shareholders.

3. *Any rights acquired by Eschmann, or by his wife or attorney through him, under the lower State Court original decree, were subject to be divested by a reversal; and when the decree was reversed, all such rights were vacated.*

1. The Engelhard Co.'s action in transferring the stock pending the appeal was its voluntary act, and was in no sense an act done under or pursuant to the judgment.

The original State Court judgment did not grant any right to, impose any duty upon, or require any action by the Engelhard Co., which was not even a party to the suit at that time (R. 23, 15). The judgment merely permitted Eschmann *to have possession* of the stock certificate. Consequently, any action taken by the Engelhard Company, which was not a party to the suit, was taken on its own responsibility, *and was in no wise, in the nature of an action taken pursuant to, or under the provisions of the judgment.*

2. There was no judicial sale under the State Court's original decree dismissing the bill. Hence,

neither Eschmann, his wife, McDowell, Engelhard or the Engelhard Co. can claim protection under the rules applicable to purchasers at judicial sales.

Putting then to one side cases of purchasers *under* judicial sales (where for reasons of public policy judicial sales are protected even in the event of reversal, 96 Am. St. Rep. 136 note), the law is well settled that even if a *bona fide* purchase, for value, is made after an appeal is taken, the purchaser's title *remains subject* to the final decision of the Appellate Court; and hence his title is lost if that results in a reversal. (See *Kirkland* v. *Trott,* 75 Ala. 321; *Real Estate Sav. Co.* v. *Collonious,* 63 Mo. 290; *Carr* v. *Cates,* 96 Mo. 271, 274; *Dunnington* v. *Elston,* 101 Ind. 373, 375; *Debell* v. *Foxworthy,* 9 B. Mon. 228; *Clark* v. *Farrow,* 10 B. Mon. 446; *Clarey* v. *Marshall,* 4 Dana, 95; *Martin* v. *Kennedy,* 83 Ky. 335; *Cook* v. *French,* 96 Mich. 525; *Lord* v. *Hawkins,* 39 Minn. 73, 76; *Smith* v. *Burns,* 72 Miss. 966; *Harle* v. *Langdon,* 60 Tex. 555.)

The reason for the rule is thus stated in the old Kentucky case of *Clarey* v. *Marshall,* 4 Dana, 95, 98, with a force that cannot be improved:

> "It has often been decided, that a *bona fide* purchaser under a decree or judgment, may, if the court had jurisdiction, hold the thing so purchased, notwithstanding a subsequent reversal of the judgment or decree for error or irregularity. But neither Edmonson, nor his vendees, can be protected by the principle of this judicial doc-

trine. That principal is one of supposed public policy altogether.

"As those who may be expected to purchase at judicial sales cannot be presumed to know whether (the court having jurisdiction) the judgment or decree is erroneous and may be reversed, and as it is a matter of great public concern, that persons disposed to buy property at such sales, should bid with confidence in the effectiveness of the sale, and should be protected by the law, whose interpreters and ministers invited them to buy—it has been deemed better, as a general rule, that such sales should not be frustrated, so far as the purchaser may be concerned, by a subsequent reversal of the judgment or decree; and that the person whose property was sold, rather than such a purchaser, should give it up.

"But none of this reasoning applies to this case. Edmonson was no purchaser under the decree in his favor. The decree itself erroneously gave him that to which he was not entitled; and, the subsequent modification of that decree necessarily divested him of all semblance of title derived *only* from the decree.

"Nor do his vendees stand in the attitude of purchasers under a judgment or decree of court. They voluntarily bought of him that to which he had an *ostensible judicial right;* but they had bought it, not under the authority or at the instance of a court or any officer of the law, and certainly took it—as *his* title—on *his* responsibility, and subject to all the contingencies to which the title of a vendor is ever liable. They bought only his right. They bought it from *him,* and could not have acquired, thereby, a better or any other right than he had. His right was liable to defeasance; this they must have known, or should be presumed to have understood. *His title has been defeated;* and therefore, *theirs* which was only derivative and depended *entirely* on *his,* must also have failed at the same instant. After his

> right had been transferred to them they stood precisely as he would have stood had he never conveyed his interest to them. And, of course, when the decree, which was the only foundation of his and their title, was annulled, no title remained in them."

As there, so here. Eschmann had an "ostensible" title to the stock. But with Mackenzie asserting a title or claim thereto, if the corporation, with notice, undertook to decide between those conflicting claimants, it did so at its peril, and took the chance that always follows of "guessing wrongly" as to the rights of conflicting claimants.

Consequently, when the judgment awarding the stock to Eschmann was reversed, he lost his title, and those (Mrs. Eschmann, McDowell and Engelhard) who took title from him with full knowledge or without value, also lost their title.

This is because of the doctrine of *lis pendens*. This Court and the Kentucky Court of Appeals both hold that an appeal is a mere continuation of the original suit, so that the *lis pendens* established by the suit continues until the expiration of the time for appeal; or, in the event of appeal, until the final disposition of the case by the Appellate Court.

Indeed, no Court has gone further than the Kentucky Court of Appeals in holding that if the title of a grantor is subject to divestiture by reversal, so must the title of his grantee be similarly divested in cases of reversal; and that the rule protecting purchasers under judicial decrees is,

for reasons of public policy, an *exception* to the normal rule, and is not to be extended beyond that special case. (Cases cited, p. 28, *supra.*)

In *Golden* v. *Riverside Coal & Timber Co.,* 184 Ky. 200, 205, the cases cited were approved, and the reason for the decision thus stated:

> "An appeal is usually held to be a continuation of the action, and not a new action, and one who knows of the pendency of the suit and the rendition of the judgment is presumed to know, that an appeal may be taken from the judgment within the time prescribed by law. The Riverside Coal & Timber Company had actual knowledge of the suit, the subject of controversy, and the rendition of the judgment, at the time, it made its purchase. It was a *pendente lite* purchaser, which is a purchaser, with knowledge of the subject of the controversy and the claims of the litigants. Such a purchaser from one of the parties to the action takes the property subject to the results of the litigation, and holds it, with no more rights therein, than his vendor, so far as his purchase affects the rights of the successful litigation [citing many cases]. A *pendente lite* purchaser is bound by the judgment if rendered against the party from whom he purchased [citing many cases]."

The foregoing quotation disposes of most of the arguments advanced by the Engelhard Company.

A striking illustration of the extent to which the Kentucky Court of Appeals has gone is shown in *Webb* v. *Webb's Guardian,* 178 Ky. 152, where, while reaffirming the doctrine as to judicial sales, the Court said (p. 160):

> "Further, limiting the doctrine to the demands of public policy, it has been continuously held, that when property has been obtained under the judgment of a court, without the intervention of a *sale* by a commissioner, the parties, who obtain the property and their privies, are *pendente lite* purchasers, and in the event of a reversal of the judgment, may be required *to return* the property *or its value* to the owner."

And after further considering the general rule protecting purchasers at judicial sales, it was said:

> "The hard and inflexible rule, above stated, has been changed, to the extent, that, if the purchaser at a judicial sale, either under execution, or a decree, is a party to the record who procured the erroneous judgment, *or his attorney*, or assignee before the sale, when it is reversed upon appeal, if the property sold is in the hands of such party, he may be required to make restitution of the property, and if not, he can be made liable for its value or at least all, which he received from the sale."

3. The Engelhard Co. cites *Fidelity Trust Co.* v. *Louisville Banking Co.,* 119 Ky. 675; *Langley* v. *Warner,* 3 N. Y. 327; *Bank of United States* v. *Bank of Washington,* 6 Pet. 19, and *Insurance Co.* v. *Clark,* 203 U. S. 75.

The cases are not in point.

In the *Langley* and *Bank of United States* cases, a plaintiff recovered judgment against a defendant, execution was issued and the money collected thereon by the plaintiff, who then, in due course, paid the money so collected to his own creditors. Subsequently the original judgment

was reversed, and the defendant, in seeking restitution of the money he had erroneously paid to the plaintiff, endeavored to collect it from the plaintiff's *creditors* to whom it had been paid. It was correctly held that so long as the judgment remained in force, the collection by the original plaintiff of the money from the defendant was perfectly valid and binding, and thus having a valid title to the money so collected, he was entitled to pay his debts with it, even though his creditors knew how he had obtained the funds. The plaintiff was, of course, liable personally to restore the money to the defendant, but his *creditors* were not required so to do.

The *Fidelity Trust Co.* case was substantially similar. The plaintiff was adjudged a lien on a fund in Court, and under orders of the Court (instead of execution) received the money which he then paid to his *creditors*. The judgment being reversed, it was held that the persons entitled to the money could not recover it from the *creditors* to whom it had been paid.

The Kentucky Court of Appeals had no intention of overturning the long line of previous decisions holding that a purchaser of property from one whose title rests upon an unsuperseded judgment that is reversed after the purchase, is automatically divested of his title; and the basis of this particular decision was the difference between money and property, as is shown by its subsequent reaffirmation, in *Webb* v. *Webb* and *Golden* v.

Riverside Coal & Timber Company, of the general rule that a reversal *does* divest the title of one who has purchased from the successful party pending the appeal.

If any Kentucky or Federal cases to the contrary are cited, it is believed that every one will be found to be an instance where the purchaser (1) acquired his title *at* a judicial sale, or (2) acted in *obedience to an express command* of a judgment for the payment of money, or for the performance of some other act. See also *Phelps* v. *Elliott,* 35 Fed. 455, 460, where it is said:

> "Except as to such purchasers [at a judicial sale] the rule is that all persons who rely upon appealable decisions must take the risk of the ultimate decision [citation omitted]."

Money is very different from corporate stock. A creditor receiving payment out of money lawfully in the plaintiff's hands, occupies a very different position from a corporation who choses to transfer corporate stock upon its books at the request of an ostensible owner, with full knowledge that another person is claiming title thereto.

In the *Clark* case, a plaintiff recovered judgment against an insurance company which, without even the issuance of an execution, paid the amount into Court from which it was disbursed to the plaintiff and her attorneys. Subsequently the insurance company brought suit against the plaintiff, and the persons who received the money, to recover it upon the ground that the judgment was

obtained by the plaintiff's fraud. It was held that the company could recover the money from the fraudulent plaintiff, but not from the persons to whom the plaintiff had paid it in satisfaction of valid claims. The Court said (203 U. S., at p. 73):

> "It is said that the title of the appellees [lawyers] stands on the judgment, and that if the judgment fails, the title fails. But that mode of statement is not sufficiently precise. The judgment can hardly be said to be part of the appellee's title. It simply afforded the appellant [insurance Company] a motive for its payment into court. The appellees [lawyers] derived their title immediately from Mrs. Mettler [fraudulent plaintiff], and *remotely* from the act of the appellant [insurance Company]."

In other words, the point of that case was that as the fraudulent plaintiff got, by the judgment, a good title for the time being to the money, in paying the money to her lawyers, their title did not depend upon the judgment at all, but merely rested upon the relation of debtor and creditor, and that hence the ultimate setting aside of the judgment for fraud (while the plaintiff if solvent could be required to restore the money), did not require her creditors to restore that which she had paid to them.

The decisions in those four cases were based upon the well established rule (2 R. C. L. 273) that

> "Where by virtue of a judgment a party in whose favor it was rendered receives money, which he subsequently pays over to his creditors,

upon reversal the latter cannot be required to make restitution."

But while fully conceding the validity of that proposition, it is not in point. If Eschmann had withdrawn money from Court and paid it to his creditors, they would have had an unassailable title thereto, even if the judgment had subsequently been reversed.

But that is not the case here.

The judgment merely gave him possession of a certain stock certificate. It did not thereby lessen the obligation of the corporation not to transfer that stock upon its books except at its own peril, when it had notice that there was an adverse claimant thereto. In such a case it is a principle of corporate law that the corporation must be sure as to the person who is rightfully entitled to the stock (p. 40, *infra*).

The defect in the argument for the Engelhard Co. is that it assumes (1) that what the Engelhard Co. did was *under and pursuant to,* and consequently *protected by* a judgment of the Court, *whereas,* what the Engelhard Company did was as a pure *volunteer,* because it chose to assume that the judgment would never be reversed; and (2) that the Engelhard Company was under no necessity of requiring an indemnity bond from Eschmann to protect it against a possible reversal, *whereas,* it is a commonplace of financial life, that corporations will not transfer stock where there are conflicting claimants, unless the corporation is

protected against the possibility of a claim against itself.

4. In response to the Engelhard Co.'s contention that it was not a party to the State Court suit at the time of the original judgment, and hence was not bound by the consequences of a reversal, it is sufficient to reply: (*a*) the rule of *lis pendens* is most frequently invoked against a stranger to the litigation, who has *knowledge* thereof; (*b*) the Engelhard Company was originally a party to the suit; it *procured* its own dismissal therefrom upon the ground that it was *not* a proper party, and that Mackenzie could not make it a party to the suit until he had first established his right to the stock; the trial Court sustained the Engelhard Co.'s contention that it "cannot be proceeded against until plaintiff becomes the owner of a certificate and a new certificate in his name is demanded by him and refused by the Engelhard Company (R. 16)," which is precisely the course Mackenzie pursued. Having procured that ruling, the Engelhard Co. is now estopped from claiming that it should have been a party to the suit or that Mackenzie should have pursued some other course. (*Doniphan* v. *Bill*, 1 B. Mon. 199, 200; *Taylor* v. *Cook*, 136 Ala. 354, 378-9; *Kelly* v. *Norwich Co.*, 82 Ia. 137, 141.)

SECOND POINT.

The Engelhard Company was liable to Mackenzie for refusing to transfer to him the 130 shares of stock.

Both the District Court (R. 33-36), and the Circuit Court of Appeals (R. 42-44), held that the Engelhard Company was liable to Mackenzie. The *extent* of that liability will be considered hereafter (pages 40, 45).

Mackenzie, having acquired title to the stock, was entitled to demand a transfer thereof on the company's books, and when it refused, he could maintain an action, in equity, to compel a transfer of the stock to him and an accounting for dividends paid since he became the owner. (*St. Romes* v. *Cotton Press Co.*, 127 U. S. 614; 14 Corpus Juris, 757, §1158; *Cushman* v. *Thayer Mfg. Co.*, 76 N. Y. 365, 368-370; *Mundt* v. *Commercial Nat. Bank*, 136 Am. St. Rep. 1023 and monographic note, pp. 1030, 1035, 1039; *Citizens Nat. Bank* v. *State*, 45 L. R. A. (N. S.) 1075, and elaborate note, pp. 1080-1082; see also *Leurey* v. *Bank*, Ann. Cas. 1913 E, pp. 1174-1176, note and cases there cited; 4 Pomeroy's Eq. Jur., 3rd Ed., §1412, note.)

The law in Kentucky is to the same effect (*Bank of Ky.* v. *Winn*, 110 Ky. 140; see also the important case of *Ramage* v. *Gould*, 176 Cal. 746.)

To a suit of that kind, the corporation (Engelhard Co.) is the only necessary party; and third persons (Mrs. Eschmann or McDowell) claiming to hold certificates for the same stock are not nec-

essary parties. In *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, a corporation in 1853 transferred the widow St. Romes' stock to a third party. In 1876 her daughter brought suit in a Louisiana State Court against the corporation to recover the dividends. The Court dismissed the suit because the then holders of the stock, who had received the dividends, were not made parties. In 1882 she sued the corporation alone to compel the issuance of a stock certificate and to recover the dividends for the past thirty years and the Supreme Court, in sustaining her right, said (p. 619):

> "If the Supreme Court of Louisiana was right in dismissing the suit for want of proper parties, the present suit is obnoxious to the same objection. * * *
>
> "But *was* the Louisiana court right in its conclusion as to necessary parties? If a corporation has by negligence cancelled a person's stock, and issued certificates therefor to a third party who has purchased it from one not authorized to sell it, is the true owner bound to pursue such purchaser, or may he directly call upon the corporation to do him right and justice by replacing his stock, or paying him for its value? The weight of authority would seem to be in favor of the latter alternative. See *Telegraph Co.* v. *Davenport*, 97 U. S. 369; *Loring* v. *Salisbury Mills*, 125 Mass. 138; *Pratt* v. *Taunton Copper Co.*, 123 Mass. 110; *Pennsylvania Railroad Co.'s Appeal*, 86 Penn. St. 80; *Loring* v. *Frue*, 104 U. S. 223; *Salisbury Mills* v. *Townsend*, 109 Mass. 115."

To the same effect is *Skinner* v. *Ft. Wayne R. Co.*, 58 Fed. 55, 58.

Consequently, Mackenzie did not have to make Mrs. Eschmann or Mr. Engelhard, now holders of the new certificates, parties to the present suit.

We submit:

I. *When a corporation knows that there are rival claimants to a certificate of stock, which controversy is in litigation, it acts at its peril in deciding between them: and if the corporation "guessing wrong" as to which will ultimately have the better title, it is responsible to the rightful owner.*

In 1 Machen's Modern Law of Corporations, §935, after discussing at length a corporation's duty to transfer stock presented to it. and its obligation to see that the stock is only transferred to the real owner thereof, the learned author says:

> "Sec. 935. *Company in Dilemma when disputed Transfer presented for Registration—Interpleader.*—When a transfer of shares is presented for registration, the company is in a strait betwixt two. If the company refuses to register the transfer and the refusal turns out to have been wrongful, the company may be held liable, according to the principles stated above. If, on the other hand, it registers the transfer, and afterwards the fact transpires that the transfer was forged or otherwise invalid, the company is then liable to the true owner of the shares. *Accordingly, if the company is in doubt whether a transfer ought to be registered or not, a bill in the nature of a bill of interpleader may be filed against the various claimants;* but if the company decided the question for itself and registers the transfer, it cannot subsequently file a bill to re-

quire the claimants to interplead. * * * If his [true owner] name is improperly stricken from the register in pursuance of a spurious or otherwise invalid transfer, he may compel the company to restore his name, probably by a writ of mandamus at law, and certainly by bill in equity. * * * In a New York case, it was said that if the company should be unable to restore the shares, it might be compelled to pay their value, but it would seem always to be legally possible to restore the shares by cancelling the entry of the transfer. * * *

"In addition to this relief, the true owner of the shares may require the Company *to pay him any dividends* which were payable while his name was erased from the register, and which were paid to the person whose name was wrongfully substituted. * * *

"Sec. 937. As an alternative to these remedies the true owner of the shares may elect to treat the registration of the forged or otherwise invalid transfer as a conversion of his shares by the Company, and may accordingly sue the Company for damages."

Here is a case directly in point:

In *Miller* v. *Doran,* 245 Ill. 200, Mrs. Doran owned shares of stock in the United States Steel Corporation, which she had endorsed in blank. Without her knowledge her husband pledged them with Miller & Co. for his own speculations. Miller & Co. sent the stock to the Steel Corporation for transfer. Mrs. Doran found it out and notified the Steel Corporation not to transfer the stock.

Thereupon Miller & Co. filed suit against Mrs. Doran and the Steel Corporation to establish its ownership to the stock and get it transferred. The lower Court decided that the stock belonged to

Miller & Co. Before Mrs. Doran appealed, Miller & Co. by a writ of replevin got possession of the stock from the Steel Corporation and returned it to the Steel Corporation, which transferred it to Miller & Co., and it was sold to third parties.

Subsequently Mrs. Doran perfected her appeal and got a reversal of the case, where, on a second trial it was held that the property belonged to Mrs. Doran and that the Steel Corporation must deliver the stock to her or pay her the value thereof.

The Steel Corporation appealed, claiming that they had transferred the stock to Miller & Co.,

> "while the first decree of the Circuit Court was in full force and effect and *before* that decree had been reversed, and that they are protected from all liability to Birdie Doran growing out of the transfer and surrender of said stock to L. D. Miller & Co. by the first decree entered in this case" (p. 203).

The Court held against the Steel Corporation upon two grounds:

First: That its transfer of the stock to Miller had not been by virtue of any *command* in the decree below, but that they had transferred it simply because Miller & Co. had presented the stock to the Steel Corporation for transfer.

The Court said (p. 204):

> "If said corporations did transfer said stock to any other person than Birdie Doran or her assignee upon the stock books of the United States Steel Corporation while said decree was subject to review and reversal, *they took their chances of said decree being reversed.*"

Second: That the original decree in favor of Miller & Co. had been *reversed.*

The Court said (p. 205):

> "It is also contended that Birdie Doran should be barred from any relief as against the corporations, on the ground that she did not immediately, by appeal or by writ of error and a *supersedeas* stay proceedings in the trial Court until she obtained a review of said decree.
>
> "A sufficient answer to this contention (regardless of the fact whether or not the corporations could have had said decree reviewed by appeal or writ of error) is, that the corporations did not make the transfer of said stock or deliver the same to L. D. Miller & Co. by reason of the *command* contained in said decree remaining in force and because it had not been stayed by an appeal or writ of error and *supersedeas,* as said transfer and delivery of said stock were made by the corporations to L. D. Miller & Co. upon the request of Louis G. Bostedo [one of the partners] after he had obtained the possession of said stock by a writ of replevin—that is, Louis G. Bostedo obtained the possession of said stock from the corporations by a writ of replevin and then immediately returned the stock to the corporations, and the stock was then transferred upon the stock books of the U. S. Steel Corporation by the corporations and delivered to L. D. Miller & Co. who were by such action placed in a position where they could transfer the stock to innocent parties and deprive Birdie Doran of her stock. These facts, we think, make the corporations liable to Birdie Doran to deliver to her her stock or its equivalent, or to pay to her the value thereof."

So here, the Engelhard Co., not acting under any command of the Court,* nor in any effort to see that the true owner got the stock, but in a volunteer desire to help its President's sister and brother-in-law, it on request, and without notice to Mackenzie (but whether it took indemnity or not is undisclosed), attempted to transfer the stock and put it beyond Mackenzie's reach, even if he should reverse the lower Court's decree under which Eschmann temporarily got possession of the certificate. It was a purely voluntary act by the Engelhard Co.

When, on February 20, 1915, Eschmann requested the Engelhard Co. to transfer the stock, it was both its right and duty to refuse to transfer the stock pending the final determination of the litigation (Note to 136 Am. St. Rep. 1031 (*c*), 1033 (*d*)).

The Engelhard Co. had an easy means under the authorities cited (p. 40, *supra*) of completely protecting itself—either to interplead or to refuse to transfer the stock until the appeal was decided, or to demand an adequate bond of indemnity before transferring the stock (see also note to *O'Neil* v. *Wolcott Mining Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200, at p. 201; *Mundt* v. *Commercial Nat. Bk.*, 136 Am. St. Rep. 1023, 1030 1 note, 7 R. C. L., p. 268). It did none of them, but elected to take sides with Eschmann and it must now take its medicine.

*As to which a different rule might prevail. 2 Cook on Corp., §361.

II. *A corporation is bound, at its peril, to avoid the issuance of certificates of its shares (in lieu of surrendered certificates) to anybody but the true owner; and in event that it issues new certificates to one not the true owner thereof, the true owner is entitled to maintain a suit in equity against the corporation to compel the issuance of new certificates to him, or, in the alternative, to recover the value of his stock.*

Before Mackenzie commenced his original suit he notified the Engelhard Co. that the stock had been pledged to him. The Engelhard Co. was kept fully advised of Mackenzie's claim to the stock "throughout the progress of the litigation both in the lower Court and in the Court of Appeals" (R. 3); and Mackenzie's valid lien upon the stock was established by a Court having personal jurisdiction of the parties and is beyond question (*Black* v. *Zacharie*, 3 How. 483, 513).

The law is abundantly settled that a corporation assumes, as a part of its corporate duties, the entire burden of ascertaining the true ownership of stock before it issues a new certificate in the place of one which is surrendered for cancellation.

In *Telegraph Co.* v. *Davenport*, 97 U. S. 369, 372, the true owner of stock which had been abstracted from her safety deposit box by a trusted relative, surrendered to the corporation by means of forgery of her signature (which he witnessed as genuine) sued the corporation, in equity, to compel the issuance to the complainant of a new cer-

tificate in the place of the one surrendered, and to pay the back dividends, or to pay the complainant the value thereof. The Supreme Court said:

> "The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires in the cases mentioned that the property wrongfully transferred or stolen should be restored to its rightful owner."

Should an attempt be made to distinguish the foregoing case from the case at bar, upon the ground that the certificate of stock in that case was feloniously stolen, while in the case at bar it was surrendered to Eschmann under an order of

Court which was subsequently reversed, the attempted distinction must fail, because the reason, in the case of the stolen certificate, is the identical reason which we rely upon in this case, to wit, in both cases the true owner has been deprived of the evidence of his ownership of the property, without his assent or negligence, and the adverse claim is founded upon a wrong inflicted upon the true owner. The deprivation of the evidence of ownership without the assent or negligence of the true owner, is the basis of his right, and not the particular *means* by which that deprivation has been produced.

In *Moores* v. *Citizens National Bank,* 111 U. S. 156, the attitude of the parties was the reverse of their attitude in the case at bar. The plaintiff there was the person to whom had been wrongfully issued shares of stock in the place of shares of stock which the true owner had conveyed to another. The case was the same as if Mrs. Eschmann and Mr. McDowell sued to compel recognition by the Engelhard Company of their rights as stockholders by reason of the issuance of such new certificates. The complainant was denied relief, upon the ground that it is the *true owner,* and not the later person holding the fictitious evidence of title, whose title should be recognized. The Court said:

> "When a corporation, upon the delivery to it of a certificate of stock with a forged power of attorney purporting to be executed by the rightful owner, issues a new certificate to the present

holder, who sells it in the market to one who pays value for it, with no knowledge or notice of the forgery, the corporation is doubtless not relieved from its obligation to the original owner, but must still recognize him as a stockholder, because he cannot be deprived of his property without any consent or negligence of his. *Midland Railway* v. *Taylor,* 8 H. L. Cas. 751; *Bank* v. *Lanier,* 11 Wall. 369; *Telegraph Co.* v. *Davenport,* 97 U. S. 369; *Pratt* v. *Taunton Copper Co.,* 123 Mass. 110; *Pratt* v. *Boston & Albany Railroad,* 126 Mass. 443. And the corporation is obliged, if not to recognize the last purchaser as a stockholder also, at least to respond to him in damages for the value of the stock, because he has taken it for value without notice of any defect, and on the faith of the new certificate issued by the corporation." See *Bangor* v. *Elec. L. & P. Co.,* 52 Fed. 520; *Citizens St. Ry. Co.* v. *Robbins,* 128 Ind. 449; *Baker* v. *Atlantic Coast Line,* 82 N. C. 146.

The only remaining point is this: What is the *extent* of the Engelhard Co.'s liability to Mackenzie?

THIRD POINT.

Mackenzie is entitled to recover from the Engelhard Co., either:

(1) The 130 shares of stock and all dividends declared since October 30, 1918; or

(2) The agreed value of the stock as of October 30, 1918, plus the dividends subsequently declared thereon.

I.

When on July 15, 1918, Mackenzie bought the 130 shares at the judicial sale, which was duly confirmed on October 30, 1918, he was vested with a good title and was entitled to have the Engelhard Co. transfer it to him. (*St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, and cases cited p. 38, *supra.*)

The Engelhard Co. can be required to cancel on its books the 25-share certificate issued to its President, Mr. V. H. Engelhard, and the 105-share certificate issued to his sister, Mrs. Eschmann; to deliver a new 130-share certificate to Mackenzie and to pay him the dividends on such stock since his purchase, with interest thereon from their respective dates. This is so because Mr. Engelhard and Mrs. Eschmann hold the stock and the company paid the dividends to them, and they collected those dividends with full knowledge of Mackenzie's ownership of the stock.

The fact that Mrs. Eschmann (wife) and Mr. McDowell (attorney) are not parties to this suit, is no ground for denying Mackenzie full relief

(*St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, and cases cited p. 38).

If it be suggested that the Engelhard Co. cannot lawfully issue to Mackenzie a new certificate for 130 shares, while certificates for that amount are outstanding in the hands of Mrs. Eschmann and Mr. Engelhard (McDowell's transferee), it is sufficient to respond that as certificates of stock are not negotiable instruments, the Engelhard Co. can discharge its obligation to Mackenzie by (1) issuing to him the stock and (2) paying the back dividends; and it can then refuse to recognize the stock outstanding in the hands of Mrs. Eschmann and Mr. Engelhard. As they were not purchasers for value and without notice, they have no claim against the Engelhard Co. If the Engelhard Co. cannot recover from them the dividends heretofore paid it, it will lose that amount.

But no matter what the rights are as between the Engelhard Co., on the one hand, and Mrs. Eschmann and Mr. Engelhard, on the other, it cannot affect Mackenzie's right to receive the stock and the dividends.

II.

If, however, this Court should be of the opinion that the Engelhard Co. cannot be required even technically to create an over-issue of its stock while certificates of 130 shares are known to be in existence in the hands of Mrs. Eschmann and Mr. Engelhard, then Mackenzie is entitled to be placed

in as good a position as if he had received the stock.

It is stipulated that the value of the stock was $130 a share; and that dividends of 25% and 18% were declared in 1918 and 1919. It is not shown what dividends were declared in 1921-1924.

If Mackenzie is not to receive the stock itself, he should have a judgment against the Engelhard Co. as follows:

130 shares at $130 per share	$16,930.00
20% dividend (Nov. 30, 1918), *plus* interest to date of decree	3,250.00
18% dividend (Nov. 30, 1919), *plus* interest to date of decree	2,340.00
Such further dividends, with interest thereon, as upon a return of the case to the lower court, shall be ascertained as declared pending this litigation.	

In view of the many years of delay to which Mackenzie has been subjected it would be more equitable to give the stipulated value of the stock *plus* the dividends and interest thereon. (*Bank of America* v. *Macneil,* 10 Bush, 54.)

FOURTH POINT.

The Circuit Court of Appeals erred in limiting Mackenzie's recovery to his original $7500 debt and interest.

The Circuit Court of Appeals held (p. 11, *supra*) that the action of the State Court (1) in decreeing a sale and (2) in confirming the sale made thereunder [without Mackenzie bringing

the corporation in as a party to the suit, *the very thing which Mackenzie had, in the first instance, actually done, and which the State Court, at the corporation's own instance, had decided was improper and dismissed it from the litigation*] produced "a grossly inequitable result," because it permitted Mackenzie not only to own the stock, but after crediting on his debt the $100 paid, left the balance of his claim unimpaired against the judgment-debtor (R. 43); and that the Federal Court, sitting *in equity* (as distinguished from law), had the right to deny to the purchaser some of his legal rights acquired under the State Court's judgment, as a condition of granting him any relief in equity, even though such relief was nothing but a pure money judgment in the nature of damages (R. 42, 44).

Accordingly, the Court of Appeals declined to recognize or to enforce Mackenzie's rights as the *owner* of the stock purchased at the judicial sale; but held that as the corporation, with full knowledge of Mackenzie's lien claim as pledgee of the stock, had, at the pledgor's request, during the pendency of the litigation, and before the decree of sale, transferred the stock, *pendente lite,* to the pledgor's wife and attorney (neither of whom were purchasers without notice), the corporation had wronged Mackenzie and was liable to him, but (*a*) *not* for the *stock* itself, *nor* (*b*) in damages for the *value* of the stock he had purchased, *nor* (*c*) for the *dividends* declared thereon

after the purchase, *but* (*d*) *only* for the original amount of Eschmann's note, with interest, and a part of the costs of the State Court suit—something with which the corporation had no concern and which had been merged in the State Court judgment (R. 44).

If its decision is right, then, whenever a Federal Court shall foreclose a railroad mortgage, sell the property, and by deed convey it to a purchaser, who, desiring to enforce some equitable right arising from the fact of his ownership under such foreclosure decree, brings a suit in a State Court, it leaves the State Court free (under the doctrine now announced) to hold that the Federal foreclosure sale produced "a grossly inequitable result," and to substitute its own views as to what it will give to the purchaser (admittedly less than his rights under the purchase) as a substitute for the rights established by the Federal decree.

Can a Federal Court (because it thinks a State Court judgment produced an "inequitable result"), set up its individual ideas of what constitutes an "equitable result," and can compel a litigant to accept such modified rights, instead of receiving full Federal relief based upon the legal effect of a final decree of a State Court.

The Circuit Court of Appeals, in effect, denied the full faith and credit to the State Court judgment, which by statute it is required to accord (R. S. 905; *Cooper* v. *Newell,* 173 U. S. 555, 567).

In *Yazoo & M. V. R. Co.* v. *Clarksdale*, 257 U. S. 10, there was a sale of 250 shares of railroad stock under an execution issued on a Federal Court judgment. Subsequently, a State Court, sitting in equity, held that the sale was void and that it would compel the purchaser at the Federal Court sale to give up that which he had obtained at the sale and to recognize the original defendant as the owner of the stock. On *certiorari*, this Court held that the Federal Court sale was valid, vested a good title in the purchaser, and reversed the State court.

In the case at bar, the sale took place, not under an execution, but at a *regular judicial sale*, confirmed by the State Court itself; and it was a Federal Court, in equity, which denied the purchaser title to the stock, although it did give him *partial* relief in damages. The Court of Appeals conceded that the sale to Mackenzie was valid and attempted to justify its disregard of the owner's rights by reference to the general equitable principle that the relief granted might be less than the legal rights. It erred in its conception of the function of that principle which cannot properly be utilized to enable a Federal Court to disregard rights and titles acquired under valid State Court decrees, in order to conform such rights and titles to what the Federal Court thinks the State Court *should* have done.

If a Federal Court had sold a railroad under foreclosure, no State Court would be allowed to

disregard the purchaser's title so acquired, and merely grant him a lien for his purchase price, while restoring the property to the original owner, because the State Court felt the Federal decree produced a "grossly inequitable result." As this is a matter of general equitable jurisdiction, a Federal Court has no greater power than a State Court.

ANALYSIS OF THE OPINION OF THE CIRCUIT COURT OF APPEALS.

I. The Circuit Court of Appeals *correctly* assumed that Mackenzie acquired the legal title to the stock at the judicial sale and that "in an action *at law* against the corporation for its refusal to reissue the stock to him *he would be entitled* to recover *full* damages" (R. 42), but the Court *erroneously* holds that as Mackenzie sued the corporation *in equity,* he cannot recover either the stock or full damages, because of what might be termed Mackenzie's *contributory negligence,* which it expressed in the following words (R. 42):

> "On the contrary, while Mackenzie did not directly acquiesce in the withdrawal of the certificates, he *contributed* to create the situation attending the withdrawal, surrender and reissue. To obtain a *supersedeas* would apparently have been no burden and would have avoided all later complications; and while it may be assumed that the lien upon the stock was in law reinstated *ab initio* when the judgment was reversed, yet the intermediate transfer and reissue would not have occurred if Mackenzie had taken the customary precautions to preserve his interests."

COMMENT: There is no justification for the implication that Mackenzie "contributed" to create a difficult situation by neglecting to take "customary precautions."

While Mackenzie could have prevented Eschmann from withdrawing the certificate, by executing a *supersedeas* bond with sureties to respond to all damages, etc., for keeping Eschmann "out of possession by reason of the appeal" (Ky. Code, §748), he did not care to incur the risk of great loss if, for example, Eschmann should subsequently claim he had lost a sale at a fancy price for this "close corporation" stock.

In not superseding, Mackenzie was absolutely within his rights; and his failure to supersede can not properly be made the basis by the Federal Court of a refusal to enforce his rights accorded him by the highest Court of the State when it reversed the erroneous judgment.

The critical language of the Court of Appeals applied to the *innocent* party [Mackenzie], would have been much more appropriately applied to the wrongdoer [Eschmann] and his accomplices, who transferred the stock, with full knowledge of the appeal, *for the express purpose of creating this precise* "situation attending the withdrawal, surrender and reissue."

If any judicial penalty is to be imposed, should it be upon Mackenzie (who was compelled to obey the lower court and permit his security to be taken from him, and who appealed for redress) or upon

those who designedly sought to defeat the effect of the appeal if it should be successful?

II. The Circuit Court of Appeals held that the wrong done to Mackenzie by the Engelhard Co. in issuing the stock to other persons, pending the appeal, did *not* wrong Mackenzie (R. 43),

> "to the *entire value* of the stock, since Mackenzie had therein no interest to be injured except to the extent of his lien."

COMMENT: But the Court of Appeals entirely overlooked the fact that Mackenzie's lien might, if not paid, ripen, *as it did,* into the entire *ownership* of the stock; and that the Engelhard Co.'s wrongful act, if it *deprived* Mackenzie of the *complete enforcement* of his lien into *ownership* of the stock, *did* wrong him to the *full extent* of its value.

III. The Circuit Court of Appeals said (R. 43):

> "In this situation the parties came to the foreclosure sale of the stock. Its value was $17,000, the lien was about $10,000. It was quite evident that no sale could be had at which any fair value could be realized. No counsel would undertake to advise with certainty what title would pass. The books of the corporation showed no interest to sell.* No stranger would pay a substantial price, because he would be buying only a lawsuit. Eschmann and his vendees would not bid, because they were advised, and doubtless in good faith believed, that no title would pass. The actual result was inevitable, viz., that Mackenzie would buy in the

*But Mackenzie did know this.

> $17,000 of stock for a nominal price (he paid $100), and still leave his whole claim against Eschmann for the debt practically unimpaired. This would be and was a grossly inequitable result."

COMMENT: 1. If there was any uncertainty as to the title that would pass at the judicial sale, it was certainly not the fault of Mackenzie, but it was the fault of Eschmann, his wife, his attorney, his brother-in-law, and the "family" corporation, all of whom had combined together to create just such a situation, so as to prevent Mackenzie from collecting his debt out of his security.

The Circuit Court of Appeals, however, visited the penalty upon Mackenzie who had nothing to do with creating the situation, instead of upon the debtor, Eschmann, who had deliberately created the situation to defeat his creditor.

The Court assumes that Mackenzie knew about the transfer to Eschmann's wife and attorney. But in fact Mackenzie knew nothing about it for years afterwards.

The Court's comment that "No stranger would pay a substantial price because he would be buying only a lawsuit," coupled with the further declaration that "the situation could have been easily clarified, and it was Mackenzie's duty to procure that clarification," again leaves a wrong implication, when it is remembered that it was Eschmann's attorney who appeared at the sale, and publicly stated to all bidders that certificate No. 24 for the 130 shares of stock referred to in the

judgment and advertisement of sale, had been cancelled, as the stock had been transferred by Eschmann during his life, and that there was no stock in the Engelhard Co. in the name of Eschmann or his executors and that certificate No. 24 was not then in existence, having been cancelled (R. 19). If any strangers were deterred from bidding, it was the result of the act of Eschmann and the Engelhard Co. acting through their duly authorized attorney.

2. If there was any legitimate doubt as to the title that would pass at the sale, it was no greater difficulty than frequently attends judicial sales, and could have been raised and settled by exceptions to the Commissioner's Report. But the Engelhard Co. and the Eschmanns did not wish any clarification of the situation, but simply wanted, through one device and another, to prevent Mackenzie from collecting his debt.

To that situation might well be applied the language of the same Circuit Court of Appeals (TAFT, LURTON, SEVERENS. J. J.) with reference to another foreclosure sale:

> "It looks very much as if he had dug a pit and was anxiously keeping the pathway to it in good order. Into this pit he has fallen and must there lie" (*Venner* v. *Farmers Loan & Trust Co.*, 90 Fed. 348, 360).

When the Court of Appeals expressed the opinion that Eschmann, his wife, and attorney, would not bid because they doubtless "in good

faith believed that no title would pass," it need only be responded that as between Mackenzie and Eschmann, each were advised by counsel, each was dealing at arm's length with the other, and that there is no reason for a Federal Court to intervene to deprive one party of property which he fairly purchased at public auction at a judicial sale.

While there has been much unjustifiable criticism of Federal Courts endeavoring at times to nullify State Court proceedings, it is believed that the case at bar is one of the few instances to which such criticisms might be justly applied.

IV. The Circuit Court of Appeals, while not mentioning the State Court by name, in effect, severely criticised the State Court for entering the decree selling the stock to satisfy the lien, or, in any event, for actually permitting a sale to take place, declaring that *any sale* of the stock would bring about a "grossly inequitable result" and then added (R. 43):

> "The situation could have been easily clarified, *and it was Mackenzie's duty to procure that clarification before going to sale,* if he expected to seek the aid of a court of equity in enforcing his rights as purchaser.
>
> "An appropriate proceeding could have been taken in the equity court where the case was pending, and probably as ancillary or supplemental to that case, whereby it would have been adjudicated, as between Mackenzie, the corporation, Eschmann and the purchasers *pendente lite,* just what title would pass by the expected sale. After such an adjudication the sale would have been fair to all concerned and all suitable equi-

table enforcement remedies could have been asked without embarrassment."

COMMENT: Probably nothing in the opinion of the Circuit Court of Appeals more clearly indicates (1) not only its *error,* but (2) its *unjustifiable criticism* of Mackenzie and the State Court than this quotation.

The comments of the Circuit Court of Appeals disclose a complete misconception of the facts existing at the time of the foreclosure sale. They place a burden on Mackenzie (who *knew nothing* of the secret transfer of the stock), and completely exonerate Eschmann and his secret vendees (wife and attorney) from any obligation even to disclose their interest, in order to settle what title would pass at the foreclosure sale. The Court of Appeals at more than one place on a single page of its opinion (R. 43), is guilty of an anachronism in assuming that at the time of the foreclosure sale in July, 1918, Mackenzie knew of the secret transfer to the Eschmann's wife and attorney, whereas Mackenzie did not learn it until *nearly three years* thereafter. It was a fact that was most *carefully concealed,* not only by Eschmann, but by the Engelhard Co.

Although the District Judge in two opinions (R. 6, 10) decided that the Engelhard Co. must give an account "of what has been done with 130 shares of stock," and commented on the fact that the Engelhard Co. did not disclose "to whom this certificate was issued nor who is now the holder of

the shares," the Engelhard Co. did not reveal the facts either in its answer (R. 7) or amended answer (R. 11) and the truth was first disclosed in the stipulation of facts (R. 17).

2. Why was it the duty of Mackenzie (rather than of Eschmann) to clarify the situation?

Mackenzie had an opinion of the Kentucky Court of Appeals in his favor. It was apparently the extremely simple case of foreclosing a lien on corporate stock. He was satisfied with the legality of the proceedings and that a sale would pass a good title to the stock, as even the Circuit Court of Appeals now concedes did pass.

At that time Mackenzie *did not even know* that Eschmann had secretly transferred the stock to his wife or attorney, and he never knew of that fact until nearly three years after the sale, when, in the present suit, after repeated efforts, the facts were finally disclosed on March 30, 1921 (R. 6, 10, 17).

If, at the time of the foreclosure sale, Eschmann and his secret vendees really "in good faith believed that no title would pass," it was they who should have procured a clarification of the situation. The wife and attorney could have filed intervening petitions or could have raised the question by exceptions to the report of sale.

3. When Mackenzie originally filed his suit in the State Court upon the note, seeking to enforce his lien on teh stock, he made the corporation, Engelhard Co., a party defendant (R. 15)

(the precise thing which the Circuit Court of Appeals criticised him for *not* doing); and the Engelhard Co. procured its dismissal from the suit upon the ground that it was not a necessary or proper party thereto (R. 15, 16). The State Court expressly decided that "Engelhard & Sons Co. are not a party to the transaction and are *unnecessary* parties to the action. That corporation *cannot be proceeded against* until plaintiff [Mackenzie] becomes the owner of the certificate and a new certificate in his name is demanded by him and refused by Engelhard & Sons Co." (R. 16).

As the State Court, having personal jurisdiction over Mackenzie, Eschmann and the Engelhard Co., decided, at the instance of the Engelhard Co., that it was *not* a proper party to the action and could not be sued until after Mackenzie had purchased the stock at the foreclosure sale and had been refused a new certificate, certainly the Federal Court has now no right to say *that such decision was wrong* and to defeat Mackenzie's claim, upon the ground that he ought to have brought the Engelhard Co. in as a defendant to the State Court suit—the very thing he tried to do and which the State Court held could not be done.

The State Court held that the Engelhard Co. was not a proper defendant to the suit and it was utterly impossible for Mackenzie to have carried out the Circuit Court of Appeals' suggestion that he should have made it a party.

A great injustice was done Mackenzie by the Circuit Court of Appeals, in basing its defeat of his rights, upon the ground that he did not do something which he ought to have done, when, in point of fact, *he did that very thing,* but the State Court held that he had no right to do it—and it was the State Court and *not* the Circuit Court of Appeals which was entitled to decide whether the Engelhard Co. was or was not a proper defendant in the State Court suit.

V. The Circuit Court of Appeals went upon the erroneous theory that, sitting in equity, it had the right to revise the judgments of a State Court (which was equally sitting in equity) by holding that when a plaintiff applies for equitable relief to a Federal Court, that Court can exercise its own judgment as to the relief it will grant, if it thinks that a State Court, in equity, did not decide an equity suit as the Federal Court thinks it should have been decided.

In other words, the Circuit Court of Appeals interprets the maxim, "He who seeks equity must do equity" to mean that a Federal Court in administering equitable remedies can (1) convert them into a pure money judgment and then (2) reduce the sum allowed in such an amount as, in the opinion of the Court, will compensate for the amount of wrong or error committed by another equity Court (State Court) in deciding a case properly before it. That this is not an exaggerated statement of the Circuit Court of Ap-

peals' position may be seen from the following quotation in its Opinion (R. 42, 44):

> "It is fundamental that a plaintiff who does not rely upon his strict legal rights, but asks special relief from a court of equity, subjects himself to the equitable discretion of that Court, and may be denied some measure of his legal rights if to grant them all would be distinctly inequitable. * * * The rule which shapes the relief given by a court of equity in circumstances where equitable considerations make that relief contingent upon plaintiff's acceptance of less than full legal rights, must vary in its application with every case. We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules.
>
> "We therefore conclude that as against the corporation, which in some measure represents its stockholders of record, and for the purpose of the decree which the court below, sitting in equity, ought to have rendered, it must be considered that at the time of plaintiff's demand upon the corporation for a transfer of stock, *he had only a lien for his debt and interest,* so that his measure of damages against the corporation in this equitable proceeding should be *limited* to the amount necessary to discharge such lien. The lien would, we think, include the costs of the State court proceedings up to the time of the decree of the trial court directing a sale, but not thereafter."

COMMENT: 1. The Court of Appeals, ignoring the fact that Mackenzie's lien on the stock had, by the State Court sale, disappeared as a lien and had been converted into a legal title to the stock itself, argued that "at the time of plaintiff's demand upon the corporation for a transfer of

stock," which was many months *after* the sale and the confirmation thereof, he "had only a *lien* for his debt and interest." Is not that a case of a Federal Court absolutely disregarding a State Court judgment and attempting to say that, long after the State Court had wiped out the lien and converted it into a title, that, nevertheless it still remained "only a lien"?

2. If Mackenzie got a valid title to the stock at the sale, his lien ceased to exist, he *owned* the stock, he had a deficiency judgment over against Eschmann's estate, and the Court of Appeals had no right to ignore that legal situation, and to resurrect the lien which was dead.

3. A Federal Court, in equity, is not entitled to decide a case according to its individual ideas of what the result should be, but it is bound by the fixed principles of jurisprudence, one of which is that it must give to the judgment of a State Court, having personal jurisdiction of the parties, the same effect as to the rights arising therefrom, as would be accorded by the judgment in the State where rendered (*Cooper* v. *Newell,* 173 U. S. 555, 567).

4. The Court of Appeals misconceived the nature of the equitable principle invoked by it to justify its disregard of Mackenzie's legal title to the stock, and its award of damages measured by a lien that had ceased to exist.

In *Magniac* v. *Thomson,* 15 How. 281, 300, the Court said:

> "1. That wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim, '*equitas sequitur legem,*' is strictly applicable. * * *
>
> "Equity may be invoked to aid in the completion of a just but imperfect legal title, or to prevent the successful assertion of an unconscientious and incomplete legal advantage; but to abrogate or to assail a perfect and independent legal right, it can have no pretension. In all such instances equity must follow or, in other words, be subordinate to the law."

In *Betzler* v. *James,* 227 Mo. 375, land worth $7,200 was sold at public auction by a Sheriff under a mortgage deed of trust and was bought in for $275. Subsequently the mortgagor who had refused to bid because he felt that no title would pass at the sale because of defective description, endeavored to get relief through a Court of Equity. The Court said:

> "The defendant could have attended the sale, the time and place of which he had full knowledge, and could have bid in the land for the comparatively small amount of the indebtedness and the costs of the foreclosure, but he chose not to do so. No reason has been shown why he could not have attended the sale, or why he could not have made provision for the payment of his indebtedness. The consequences are as much the fruit of his indifference to his obligation on the note as of his inexcusable neglect to protect his property. In the words of the Psalmist: 'He

made a pit, and digged it, and has fallen into the ditch which he made.' The power of a court of equity is not to be exercised to relieve a party or other person from the consequences of his own inexcusable neglect. 17 Am. & Eng. Ency. Law (2d Ed.), pp. 998, 999, and cases cited."

See also: *Old Colony Trust Co.* v. *Medfield St. Ry. Co.*, 215 Mass. 156; *York* v. *Trigg*, 87 Okla. 214; *Osborne* v. *Bank*, 9 Wh. 738, 866.

In *Heyward* v. *Bradley*, 179 Fed. 325, 330, the Circuit Court of Appeals for the 4th Circuit said, in reply to an appeal to its equitable discretion:

"• • • the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what as between the parties would be fair to be done; what one person may consider fair another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. Lord Eldon observes in the case of *White* v. Daman (7 Ves. 35): 'I agree with Lord Rosslyn that giving specific performance is matter of discretion, but that it is not an arbitrary, capricious discretion; it must be regulated upon grounds that will make it judicial. • • •

"This discretion in some cases follows the law implicitly; in others assists in and advances the remedy; in others, again, it relieves against the abuse or allays the rigor of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the Constitution intrusted with.

"• • • It is obvious that in a case of a sale at auction, if the property is sold for an extreme-

> ly inadequate value, it is impossible for the person to repudiate the contract. The mere principle of what might have been fair or what might have been the right thing to do between the parties had all the elements of value been known which have since transpired, cannot be ground for exercising or regulating the discretion of the Court if all the facts which were then in existence were known to both parties. * * *
>
> "That this is a very hard case there is no doubt, and it may be extremely proper that the plaintiff make an abatement in respect of it, but that it is a totally different matter, one which is in the forum of his own conscience, but not one which I can notice judicially."

In the case at bar, the Engelhard Co., Eschmann's estate, his wife and attorney, knew at the time of the sale, every fact that they know now. Mackenzie was the one who was kept in ignorance of all the facts. There is no reason whatever for relief to Engelhard Co. from the consequences of its own deliberate act.

5. Even if the Engelhard Co. desires to avail itself of the maxim that if Mackenzie seeks equity he must do equity, still the Engelhard Co. *must not have conducted itself in such a manner, or have placed conditions and circumstances around Mackenzie, that would make it inequitable for the Engelhard Co. to avail itself of the maxim.*

But for the wrongful act of the Engelhard Co. no damage would have occurred to Mackenzie, and hence no cause of action would have arisen; and to permit the Engelhard Co. to set up this defense would be to give it an unjust advantage

by reason of its own wrong. (1 Story's Equity Jurisprudence, 14th Ed., §74.)

The Engelhard Co., whose president was Eschmann's brother-in-law, committed the first wrong by disregarding its full knowledge of Mackenzie's pending claim, and, combining with Eschmann to defraud Mackenzie, transferred the stock to Eschmann's wife (Engelhard's sister) and attorney (also Engelhard's attorney), from which latter Engelhard himself purchased back the stock so transferred (R. 16, 17).

When the Engelhard Co. injected itself, as a volunteer, into the controversy between Mackenzie and Eschmann, and loaned its aid to assist Eschmann to defeat Mackenzie's lien, it did so at its peril; and when the Kentucky Court of Appeals reversed the judgment, all intermediate transfers to purchasers *mala fides* were vacated, and the Engelhard Co. must bear the consequences of its needless partiality.

CONCLUSION.

A large part of the wealth of the country is represented by corporate stock. Transactions in it are daily and enormous. The pledging of corporate stock for debts is probably the most widespread form of pledge now made.

If a Court having personal jurisdiction of the pledger and pledgee, decrees the sale of corporate stock to satisfy a lien therein adjudged, and a sale thereunder is had, confirmed and a Deed or

Bill of Sale given to the purchaser, is it the law that a Court of another jurisdiction, because it does not approve of the first tribunal's judgment, is free under alleged principles of equity jurisprudence, to decline to enforce the purchaser's rights and arbitrarily *to award him something less,* in order to compensate for the Court's difference of opinion as to the propriety of the first Court's judicial action?

If such is the law, then State courts will have just as much right to refuse to enforce the supposed inequitable results of Federal decrees, as in the present case a Federal Court has exercised that right with respect to a State Court decree.

The Circuit Court of Appeals should not be permitted to substitute its views for those of the State Court as to the nature of the proceedings which should have been taken in the State Court or as to the propriety of the judgment therein rendered.

The decree of the District Court should be reversed with instructions to enter a new decree in favor of Mackenzie against the Engelhard Co., for 130 shares of stock (or its stipulated value), plus all dividends, with 6 per cent interest (from the dates when paid), declared and paid since October 30, 1918.

SAMUEL B. KING,
WM. MARSHALL BULLITT,
Counsel for Louis B. Mackenzie.

30th Sept., 1924.,
Louisville, Ky.

No. [redacted]59

FILED
MAY 4 1923
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

LOUIS B. MACKENZIE, - - - Petitioner,

versus

A. ENGELHARD & SONS COMPANY, - Respondent.

RESPONSE,
PETITION FOR A CROSS WRIT OF CERTIORARI

TO THE

United States Circuit Court of Appeals
For the Sixth Circuit

AND

BRIEF FOR RESPONDENT.

R. A. McDOWELL,
Counsel for Respondent and Cross Petitioner.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

A copy of the within response, petition for a cross writ of certiorari and brief for respondent and cross petitioner, together with a notice that the petition will be submitted to the Supreme Court of the United States on May 7, 1923, is hereby acknowledged this 15th day of April, 1923.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

LOUIS B. MACKENZIE, - - - - - *Petitioner,*

vs.

A. ENGELHARD & SONS COMPANY, - *Respondent.*

RESPONSE AND PETITION FOR A CROSS WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The respondent herein, A. Engelhard & Sons Company, in response to the petition of Louis B. Mackenzie, petitioner herein, for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, deems it improper and unnecessary at this time to call this court's attention to erroneous assumptions and statements contained in said petition, as to the facts disclosed by the record; and respectfully joins the said petitioner in asking a review of the judgment complained of and hereby respectfully petitions this Honorable Court for a cross writ of certiorari, to review the judgment of the United States Circuit Court of Appeals for the Sixth Cir-

cuit, covering both an appeal and a cross appeal to that court.

The cross writ is prayed pursuant to the practice approved in the case of

Deslions v. *La Compagnie, Generale Transatlantique,* 210 U. S. 95; 52 L. Ed. 973.

The court refers to the practice as follows:

> "As the case is before us not only because of the allowance of a writ of certiorari applied for by the claimants, but also on a cross writ, asked on behalf of the petitioner, all the questions presented by the record or opinion, and, as far as they are essential, must be disposed of."

Your petitioner, A. Engelhard & Sons Company, respectfully shows to this Honorable Court as follows:

FIRST—(a) The rule of local law of the State of Kentucky with respect to supersedeas provides:

> "An appeal shall not stay proceedings on the judgment unless a supersedeas be issued."
>
> *Kentucky Civil Code of Practice,* Section 747.

(b) In its opinion and judgment the United States Circuit Court of Appeals for the Sixth Circuit failed and refused to follow said rule of local law as mandatory as will be seen by reference to the opinion of that court (record, page 57, in the middle of the page), where the court refers to the necessity for obtaining a supersedeas in order to stay proceed-

ings under a judgment simply as "customary precautions to preserve his interests."

(c) Such conflict between a State statute and a Federal court decision has been held by this court to call for the issual of a *writ of certiorari.*

Dupree v. *Mansur,* 214 U. S. 161, 53 L. Ed. 950.
Alice Bank, et al. v. *Houston,* 247 U. S. 240, 62 L. Ed. 1096.

SECOND—(a) The Court of Appeals of Kentucky has held in construing Section 747 of the Civil Code, that same is mandatory and that "upon principles of universal law, acts performed, and rights acquired by third persons under the authority of the judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal."

Fidelity Trust & Safety Vault Co. v. *Louisville Banking Company,* 119 Ky. 675.
Bridges v. *McAllister,* 106 Ky. 979.
Runyon v. *Bennett,* 4 Dana 598.
Hayes v. *Harding,* 25 Ky. L. Repr. 1454.
Hall v. *Smith, Etc.,* 162 Ky. 159.
Kaye v. *Kean,* 18 B. Monroe 839.
Clarke v. *Rodes,* 12 Bush 16.
Fraser's Exr. v. *Page,* 82 Ky. 73.
McKee v. *Smith's Admr.,* 5 Ky. Law Repr. 224.
Shultz v. *Beatty,* 6 Ky. Law Repr. 662.
Showalter v. *Simmons,* 5 Ky. Law Repr. 423.
Dudley v. *Beatty,* 5 Ky. Law Repr. 773.

(b) The United States Circuit Court of Appeals in its judgment in this case failed and refused to follow the construction placed on this Kentucky Stat-

ute by the Court of Appeals of the State of Kentucky, and in substance held that the action taken by the defendant corporation, respondent herein, while the judgment was in full force, and while no supersedeas had been issued, and though the action was entirely justified, if that judgment was correct, renders it liable to the plaintiff just as though a supersedeas had been applied for and issued.

(c) Such conflict between the decisions of the highest Court of the State and the Federal Court is held by this court to be reviewable by certiorari.

Northern Pacific, Etc. v. *Meese,* 239 U. S. 614, 60 L. Ed. 467.
Williams v. *Gaylord,* 186 U. S. 157, 46 L. Ed. 1102.

THIRD—(a) In its judgment, the Circuit Court of Apeals has failed and refused to follow the rule laid down by the Supreme Court of the United States, to the effect that as a judgment respects third persons "whatever has been done under the judgment while it remained in full force is valid and binding. A contrary doctrine would be extremely inconvenient and in a great measure tie up proceedings under a judgment during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future date be reversed, it would virtually, in many cases, amount to a stay

of proceedings on the execution. No such rule is necessary for the protection of the rights of the parties. The writ of error may be so taken out as to operate as a supersedeas."

Bank of United States v. *Bank of Washington*, 6 Peters, 8; 8 L. Ed. 299.
Insurance Company v. *Clarke*, 203 U. S. 75, 51 L. Ed. 96.
Deposit Bank of Frankfort v. *Frankfort*, 191 U. S. 499, 48 L. Ed. 276.
Crescent City, Etc. v. *Butchers Union, Etc.*, 120 U. S. 141, 30 L. Ed. 614.

(b) The effect of the ruling of the Circuit Court of Appeals in this case is that the Engelhard Company, a third party, is as liable for the action which it took and which was justified if the judgment of the State Circuit Court was correct, as if that judgment had been properly superseded.

Such conflict between the decisions of the Supreme Court and the Circuit Court of Appeals calls for the issual of a writ of certiorari.

Joplin Mercantile Co. v. *U. S.*, 236 U. S. 531, 59 L. Ed. 705.
Wright v. *Louisville, Etc.*, 236 U. S. 687, 59 L. Ed. 788.

R. A. McDowell,
Counsel for Petitioner.

STATE OF KENTUCKY,
COUNTY OF JEFFERSON. } ss.

R. A. McDowell, being first duly sworn, says that he is counsel for A. Engelhard & Sons Company, the respondent and cross-petitioner herein; that he has read the foregoing petition for a cross writ of certiorari and that the statements contained therein are true.

R. A. McDOWELL.

Subscribed and sworn to before me by R. A. McDowell this 15th day of April, 1923. My commission expires December 22, 1926.

GLOVIE M. CHELF,
Notary Public, Jefferson County, Kentucky.

[SEAL]

BRIEF.

ORIGINAL STATE COURT SUIT.

May it Please the Court:

An action was brought by Mackenzie, the petitioner herein, against F. W. R. Eschmann, in the Jefferson Circuit Court of Kentucky, to recover judgment on a note for $7,500.00, and to enforce an alleged lien on One Hundred and Thirty (130) shares of stock in the Engelhard & Sons Company. After the case was duly argued and submitted, the State court entered a judgment in two parts.

First: Dismissing Mackenzie's petition.

Second: Permitting the defendant, Eschmann, to withdraw the certificate of stock free of lien.

Mackenzie thereupon only superseded the judgment insofar as court costs were concerned; but **did not supersede** the judgment permitting the defendant to withdraw this stock free of lien. Several months later the defendant, Eschmann, presented the certificate for One Hundred and Thirty (130) shares of stock to the corporation and directed that the shares be reissued, twenty-five (25) shares to his attorney, the other One Hundred and Five (105) shares to his wife. (The Circuit Court of Appeals says there is nothing to show that the purchasers were purchasers without notice. There is nothing in the record to show that they were or were not such purchasers. As a matter of fact, the wife was an

innocent purchaser.) The corporation, defendant in the United States District Court, and respondent herein, acting in good faith, relying upon the judgment permitting the withdrawal of the stock free of lien, without any right to refuse, acquiesced in Eschmann's request, and transferred the stock as directed. This is the act held to be wrongful; because of which damages are assessed.

Approximately two years later the Court of Appeals of Kentucky reversed the case. Directed a judgment for the $7,500.00 note with interest; **but said not one word regarding any alleged lien.** As will be seen by reference to the opinion of the Kentucky Court of Appeals, found on pages 31 to 36 of the transcript of the record herein.

The United States Circuit Court of Appeals, laboring under a grievously wrong impression, erroneously states in its opinion (see Record, page 56), referring to the Court of Appeals of Kentucky, "Accordingly it reversed the decree **sustained the lien upon the stock,** directed that Mackenzie should have judgment for his debt and **that his lien should be enforced by a sale of the stock.**"

We assert positively that the Court of Appeals **did not** "sustain the lien upon the stock," **did not direct** "that his lien should be enforced by a sale of the stock," and made no other mention of a lien. To sustain our positive denial of these erroneous assertions in the Circuit Court of Appeals' opinion, we respectfully refer this court to the opinion of the

Court of Appeals of Kentucky (Record, pages 31 to 36).

Had the Court of Appeals of Kentucky held, as to a lien, as stated by the Circuit Court of Appeals, an entirely different case would be presented. It is most important that this court should verify the facts by the record.

Nevertheless, when the case was returned from the Court of Appeals, the Jefferson Circuit Court directed that the stock be returned to court, but without waiting therefor or taking any step to secure jurisdiction over or control of the stock, that court (but without any direction from the Kentucky Court of Appeals) declared that the plaintiff had a lien thereon and directed its commissioner to sell the stock, over which neither the court nor commissioner had any control, to satisfy the alleged lien.

We insist that insofar as that court, without jurisdiction over or control of the property involved, adjudged a lien to plaintiff upon that property and directed the sale of the stock, its judgment was not merely erroneous, but absolutely void, as was the sale pursuant thereto.

Nesbitt v. *Macon Bank & Trust Co.*, 12 Fed. 686.
Jones on Pledges and Collateral Securities, 2nd Ed., Paragraph 40.
Harding v. *Eldridge*, 186 Mass. 39.
Casey, Receiver v. *Cavoroc*, 96 U. S. 467, 24 L. Ed. 779.
Story on Bailments, 6th Ed. Sec. 287.
31 *Cyc.* 817.

Pomeroy Equity Jurisprudence, 2nd Ed. Sec. 1233.
Third National Bank v. *Buffalo,* 193 U. S. 581, 48 L. Ed. 81.
Helborn v. *American Mercantile Corporation,* 167 New York Supp. 711, 180 Appeal Decision 167.
Hubbell Slack v. *Farmers, Etc.* 196 S. W. 681.
New Albany National Bank v. *Brown,* 114 N. E. 486.
Geilfus v. *Corrigan,* 37 L. R. A. (Wisc. 166), 16 R. C. L., page 49.

The United States Circuit Court of Appeals in its opinion herein complained of, as will be seen by the erroneous statement in that opinion just called to this court's attention, believed that the Court of Appeals of Kentucky had decided something that it did not decide; by reason of that belief the Circuit Court of Appeals failed to recognize the requirements of the statute law of Kentucky with reference to supersedeas. *Civil Code,* 747.

It is clear, therefore, that the Circuit Court of Appeals, in ignoring this statutory requirement did so under an erroneous impression as to what the Kentucky Court of Appeals decided; because Section 747 of the Civil Code is very definite and provides "An appeal shall not stay proceedings on a judgment unless a supersedeas be issued." Not only because of this conflict between the Federal Court and a State statute but also because of the erroneous impression of the Federal Court, this

court should review this case for which purpose it should issue its writ of certiorari.

Dupree v. *Mansur*, 214 U. S. 161, 53 L. Ed. 950.
Alice Bank, Et Al. v. *Houston*, 247 U. S. 240, 62 L. Ed. 1096.

SECOND PROPOSITION.

Again, the Court of Appeals of Kentucky being the highest court in this State has construed Section 747 of the Civil Code in numerous opinions and has been very clear and positive in its statements that it is mandatory that a judgment shall be superseded and until superseded such judgment carries full authority until reversed or superseded, notwithstanding the Court of Appeals has been asked to reverse it.

The respondent herein, the Engelhard Company, relied upon the statute referred to and the decisions of the State court construing that statute, as it had the right to do, and transferred the stock represented by the certificate which the lower State court directed might be withdrawn from court free of lien. Under the opinion, however, of the United States Circuit Court of Appeals for the Sixth Circuit, that court ignores the construction placed upon that statute by the numerous cases handed down by the Kentucky Court of Appeals and holds that the action of the Engelhard Company, respondent herein, perpetrated a wrong against Mackenzie and that court holds that, because of that act, the corporation must

pay thousands of dollars in damages to Mackenzie; although that court does not consider the act of the corporation as being a very great wrong, as it says, about the middle of page 57 of the record:

> "The surrender and reissue of the certificate did not occur under circumstances which made the act wrongful as against Mackenzie in the manner and degree to which such an act is ordinarily wrongful as against the owner. On the contrary, while Mackenzie did not directly acquiesce in the withdrawal of the certificate, he contributed to create the situation attending the withdrawal, surrender and reissue. To obtain a supersedeas would apparently have been no burden, and would have avoided all later complications; and while it may be assumed that the lien upon the stock was in law reinstated *ab initio* when the judgment was reversed, yet the intermediate transfer and reissue would not have occurred if Mackenzie had taken the **customary precautions** to preserve his interests."

Thus it will be seen that the Circuit Court of Appeals has given Mackenzie the full benefit and protection of a supersedeas, notwithstanding he did not apply for a supersedeas and none was issued, and instead of the Circuit Court of Appeals following the statute law of Kentucky and the decisions of the highest court of that State, the Circuit Court of Appeals waives the necessity for securing a supersedeas and refers to that act merely as a "customary precaution" instead of a **mandatory requirement,** which it is held to be by the highest court of the

State of Kentucky, as will be seen by reference to the following cases:

Fidelity Trust & Safety Vault Co. v. *Louisville Banking Company,* 119 Ky. 675.
Bridges v. *McAllister,* 106 Ky. 979.
Runyon v. *Bennett,* 4 Dana 598.
Hayes v. *Harding,* 25 Ky. L. Repr. 1454.
Kaye v. *Kean,* 18 B. Monroe 839.
Clarke v. *Rodes,* 12 Bush 16.
Fraser's Exr. v. *Page,* 82 Ky. 73.
McKee v. *Smith's Admr.,* 5 Ky. Law Repr. 224.
Shultz v. *Beatty,* 6 Ky. Law Repr. 662.
Showalter v. *Simmons,* 5 Ky. Law Repr. 423.
Dudley v. *Beatty,* 5 Ky. Law Repr. 773.

In the first case above cited, *Fidelity, Etc.* v. *Louisville Banking Company,* Ethridge withdrew money from the court, pursuant to a judgment of the court, which judgment was not superseded, though later reversed. After the reversal, an attempt was made to require the parties, to whom Ethridge paid the money, to return it to the court. The Court of Appeals held (again reversing the lower court) that Ethridge might be compelled to pay the parties who suffered by reason of the erroneous judgment; but those to whom Ethridge paid the money had the right to accept it as he had withdrawn it under the judgment which was perfectly valid, and the judgment had not been superseded. The case is in exact point and the same rule is held by the other cases to be the rule of law in Kentucky. Because this is the rule of law in Kentucky and held to be so by the highest court of the State of Kentucky, the United

States Circuit Court of Appeals was, in duty bound, to follow this rule of law. Had it followed this rule of law, then it would have directed the United States District Court to dismiss the petition of Mackenzie against the A. Engelhard & Sons Company, that company having done nothing, which it was not justified in doing under the lower State court's judgment permitting the withdrawal of the certificate of stock from court free of lien.

We believe that this conflict between the Federal Court decision and the previous decisions of the highest court of the State and the failure of the Federal Court to follow those decisions justifies this court in issuing its writ of certiorari to review this case.

Northern Pacific, Etc. v. *Meese,* 239 U. S. 614, 60 L. Ed. 467.
Williams v. *Gaylord,* 186 U. S. 157, 46 L. Ed. 1102.

THIRD PROPOSITION.

We believe that because of the fact that the Supreme Court of the United States has, in several cases, laid down the same rule of law as was laid down by the highest court of the State of Kentucky, the Circuit Court of Appeals should be required to conform to that rule.

Bank of United States v. *Bank of Washington,* 6 Peters 8; 8 L. Ed. 299.
Insurance Company v. *Clarke,* 203 U. S. 75, 51 L. Ed. 96.

Deposit Bank of Frankfort v. *Frankfort*, 191 U. S. 499, 48 L. Ed. 276.
Crescent City, Etc. v. *Butchers Union, Etc.*, 120 U. S. 141; 30 L. Ed. 614.

The above cases sustain the proposition that (quoting from the opinion in the first case above cited), "whatever has been done under the judgment while it remained in full force is valid and binding."

The action of A. Engelhard & Sons Company in transferring the stock upon the request of Eschmann was done while the judgment of the court remained in full force, and therefore was valid. We take it that it makes no difference whether the corporation had notice that Mackenzie had appealed this judgment or not. When it referred to the record and found the judgment had not been superseded it had the right to act under a subsisting judgment and was not required to await the outcome of the appeal unless Mackenzie had taken the required steps to secure the issuance of a supersedeas, and it is most unjust to require Engelhard Company to pay Mackenzie any sum whatever because of its perfectly legitimate action.

The law provided a way for Mackenize to protect his interests. He failed to do it. The highest court of the State of Kentucky has many times decided that the only way to suspend action under a judgment is by following the rule provided by the statute and the Supreme Court of the United States has just as emphatically held to the same rule.

The respondent is entitled to have this case reviewed by this court. Let it be understood that no right of the plaintiff, Mackenzie, petitioner herein, is cut off by failure to give him judgment against the defendant corporation, respondent herein, for the reason that if his lien was as stated by the United States Circuit Court of Appeals, "reinstated *ab initio*" when the judgment was reversed, then he still has the right to enforce his lien against the stock in the hands of the purchasers. By reference to the opinion of the Circuit Court of Appeals at the top of page 60, Transcript of Record, it will be seen that on this proposition the Circuit Court of Appeals was divided, and the court says, "As an original proposition, this would be forceful, but, to the majority of the court, the contrary seems to be settled."

We feel that the failure and refusal of the Circuit Court of Appeals, to follow the statute law of the State of Kentucky, to follow the decisions construing that law by the highest court of the State of Kentucky, and the failure and refusal of the Circuit Court of Appeals to follow the rule of law laid down by the Supreme Court of the United States, will justify this court in the exercise of its discretion in issuing a writ of certiorari to review the decision of the United States Circuit Court of Appeals of the Sixth Circuit herein complained of.

Respectfully submitted,

R. A. McDowell,

Counsel for A. Engelhard & Sons Co.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

55

LOUIS B. MACKENZIE, - - - - - - *Petitioner,*

vs.

A. ENGELHARD & SONS CO., - - - *Respondent.*

59

A. ENGELHARD & SONS CO., - - - - *Petitioner,*

vs.

LOUIS B. MACKENZIE, - - - - - - *Respondent.*

On Writs of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

Brief for A. Engelhard & Sons Company,

CROSS-PETITIONER AND RESPONDENT.

J. VERSER CONNER,
PERCY N. BOOTH,
Counsel for A. Engelhard & Sons Company.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES

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59

A. ENGELHARD & SONS COMPANY, - *Petitioner,*

vs.

LOUIS B. MACKENZIE, - - - - - *Respondent.*

ON WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR A. ENGELHARD & SONS COMPANY,

CROSS-PETITIONER AND RESPONDENT.

These cases originated in the District Court of the United States, for the Western District of Kentucky, in an action brought by Louis B. Mackenzie against A. Engelhard & Sons Company, the jurisdiction of the Federal Court being based upon diversity of citizenship (R. 1). From a judgment in that court granting to Mackenzie a part of the relief

prayed by Mackenzie, both parties appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 38).

The Circuit Court of Appeals remanded the case to the District Court with directions to modify the judgment in certain particulars (R. 44-286, F. 813). Mackenzie thereupon petitioned this Court for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals, and A. Engelhard & Sons Company filed a cross petition for a cross writ of *certiorari* to review said judgment. This court sustained both petitions and issued writs of *certiorari,* both on the original petition of Mackenzie therefor (R. 47), and on the cross petition of A. Engelhard & Sons Company therefor (R. 46, 262 N. S. 739).

In this action, Mackenzie seeks to recover of A. Engelhard & Sons Company, a corporation, some $30,000.00 by reason of the refusal of A. Engelhard & Sons Company to recognize Mackenzie as a stockholder in said corporation. Mackenzie claims to be a stockholder by reason of alleged purchase of stock at a judicial sale, the purchase price being $100.00.

STATEMENT OF THE CASE.

It is somewhat difficult to ascertain exactly what act of the Engelhard Company is relied on as constituting an actionable wrong. The District Court and the Circuit Court of Appeals differed both as to the nature of the wrong and as to the extent of the corporation's liability therefor. An expression in

the opinion of the Circuit Court of Appeals indicates a difference among the judges of that court as to the existence of any liability.

The facts are to be found in the agreed stipulation of the parties (R. 14-20), and may be summarized as follows:

1. December 10, 1912, Mackenzie, plaintiff herein, presented to the defendant, A. Engelhard & Sons Company certificate No. 24 for 130 shares of its capital stock issued to and standing in the name of F. W. R. Eschmann, and Mackenzie sought to have said stock transferred on the corporate books to his name, and a new certificate issued to him. The stock was not endorsed by Eschmann, the owner, and therefore the corporation refused to make the transfer (R. 15).

STATE COURT SUIT.

2. March 10, 1913, Mackenzie *instituted an action* in the Jefferson Circuit Court (a State court of general equity jurisdiction) wherein he sought to recover of the defendant therein, Eschmann, on a promissory note, the sum of $7,500.00 and sought to enforce a lien on certificate No. 24 for 130 shares of the capital stock, of A. Engelhard & Sons Company, which he claimed had been pledged with him by Eschmann to secure the payment of the note (R. 15).

3. June 7, 1913, Mackenzie's *petition was dismissed* insofar as it was directed against the *Engel-*

hard Company and that company was never thereafter a party to the State court action (R. 16).

4. November 7, 1914, the State court *rendered a judgment for defendant, Eschmann;* dismissed the plaintiff's petition, and held that the note had been secured from Eschmann by fraud; that Mackenzie, who had purchased same from his friend and associate, Patterson, was fully conversant with the fraud, and directed that the certificate of stock be delivered to Eschmann (R. 16; opinion of Circuit Court, R. 20; judgment of Circuit Court, R. 23).

5. Mackenzie *did not supersede* this judgment or take any steps to stay its enforcement (R. 17).

6. January, 1915, after waiting more than two months for Mackenzie to appeal or execute a supersedeas bond, Eschmann *withdrew the certificate* of stock from court (R. 17).

7. *February 20, 1915, three and one-half months after it was adjudged that Mackenzie had no lien on the stock and before Mackenzie had taken any steps to perfect his appeal, Eschmann endorsed certificate No. 24, presented same to the Engelhard Company and directed that it be transferred—25 shares to R. A. McDowell, his lawyer, in payment of his fees, and 105 shares to Eschmann's wife, Bettina Eschmann. It was so transferred (R. 17). McDowell transferred his 25 shares to V. H. Engelhard, president of the defendant corporation for $2,500.00 cash.*

8. April 26, 1915, Mackenzie *filed the record* of said action in the Court of Appeals of Kentucky, thus

for the first time *perfecting his appeal* or showing any real purpose so to do (p. 18).

Under the Kentucky Statutes Mackenzie could have taken this appeal by filing the record in the office of the Clerk of the Court of Appeals at any time within two years from the date of the judgment. Kentucky Civil Code, Sec. 734 and 745.

9. March 6, 1917, the Court of Appeals of Kentucky *reversed the judgment* of the Jefferson Circuit Court (p. 18; opinion of the Court of Appeals, p. 24). Without disagreeing with the finding of the lower court as to the fraud which had been practiced upon Eschmann, or as to Mackenzie's knowledge thereof, the Court of Appeals held that Eschmann's son, and agent, with full knowledge of the fraud, condoned it and elected to abide by the contract (p. 27). Nothing was decided by the Court of Appeals as to any lien claimed by Mackenzie on the stock; and the Circuit Court of Appeals erred in holding that the Kentucky Court of Appeals had sustained said lien (p. 41).

10. October 31, 1917, *the Jefferson Circuit Court rendered judgment* that Mackenzie recover of Eschmann's estate $7,500.00 and further adjudged that Mackenzie had a lien on certificate No. 24 for 130 shares of the capital stock of A. Engelhard & Sons Company and ordered said certificate to be sold to enforce said lien (p. 18).

11. July 15, 1918, the Commissioner of the Jefferson Circuit Court, pursuant to said judgment, *undertook to sell certificate No. 24 at public sale* and

Mackenzie became the purchaser thereof for the sum of $100.00, which was credited upon his judgment against Eschmann (p. 19) and the Commissioner issued to Mackenzie a bill of sale on December 7, 1918 (p. 29).

12. April 29, 1919, Mackenzie *presented the bill of sale* to the Engelhard Company and demanded that said company issue a certificate to him for 130 shares of its capital stock (R., p. 19), but the company refused to issue same, because it had already, on February 20, 1915, more than four years before, cancelled said certificate No. 24, and issued said stock to Mrs. Bettina Eschmann and R. A. McDowell; and all of the capital stock, which it was authorized by its charter to issue, was issued and outstanding (R., p. 19).

THE DISTRICT COURT OF THE UNITED STATES.

13. Conceiving his rights to have been violated by reason of the facts above set out, Mackenzie filed his petition in equity in the District Court of the United States for the Western District of Kentucky against A. Engelhard & Sons Company as the sole defendant, and prayed that the corporation be required to issue to him a certificate for 130 shares of its capital stock or to pay to him the value of said stock plus all dividends declared thereon since July 15, 1918, the date when Mackenzie claimed to have acquired the title at a judicial sale (p. 1).

14. Judge Evans, in the District Court first overruled a motion to dismiss the petition for want of equity (p. 5); and the defendant filed an answer (p. 7); and an amended answer (p. 11); and a stipulation of agreed facts (p. 14). Judge Evans decided that plaintiff, Mackenzie, was entitled to recover (p. 31) *and fixed the amount of the recovery* (p. 35) at the amount of the debt owed by Eschmann to Mackenzie, to wit, $7,500.00, with interest, plus the dividends declared by the Engelhard Corporation since the execution and delivery of the bill of sale by the Commissioner of the Jefferson Circuit Court, the total recovery being $13,354.75.

PROCEEDINGS IN CIRCUIT COURT OF APPEALS.

15. Both parties assigned error (p. 36-37), and appealed to the Circuit Court of Appeals for the Sixth Circuit (p. 38), which court modified the judgment of the District Court and remanded the case to the District Court for a decree in conformity with the opinion of the Circuit Court of Appeals (p. 40). The Circuit Court of Appeals held that the corporation was liable to Mackenzie *for the amount of his debt and interest* (p. 44); but disallowed the dividends allowed by the District Court.

Though the Circuit Court of Appeals sustained Mackenzie's claim, it made the following findings which we think fatal to that claim: That Eschmann had a perfect right to transfer the stock to his wife

and McDowell in February, 1915, and that if the corporation had refused to transfer same at the request of Eschmann, a court of equity would have compelled it so to do. We quote from the opinion:

> "In view of the pending litigation as to the existence of Mackenzie's interest (fol. 58) and the undisputed existence of substantial interest in Eschmann, *it would seem that a court would have compelled the issue of a new certificate to Eschmann's nominees,* if that certificate should have had endorsed upon it a memorandum that it was subject to whatever lien Mackenzie might establish. *The wrong done to Mackenzie was therefore the issuing of the new certificate in such a way that it might reach a bona fide purchaser and so perhaps cut off Mackenzie's lien, but the wrong did not extend to the entire value of the stock, since Mackenzie had therein no interest to be injured except to the extent of his lien.*"

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES.

16. Mackenzie filed a petition for a writ of *certiorari* April 27, 1923, and same was sustained and the writ issued July 1, 1923 (p. 46). A. Engelhard & Sons Company filed a cross-petition for a writ of *certiorari* May 4, 1923, and same was sustained and the writ issued July 7, 1923 (p. 262 N. S. 739).

ASSIGNMENTS OF ERROR.

The assignments of error (R. 36-37), raise the question of the liability of Engelhard Company.

QUESTIONS INVOLVED.

The precise questions involved may be briefly stated.

If the defendant corporation is liable, it is because it has violated some duty, which it owed to Mackenzie. The corporation's sole connection with this case consists of its refusal on two occasions to transfer the stock to Mackenzie, and its act on another occasion in transferring the stock to the nominees of Eschmann. Which of these actions constituted the wrong?

First. Did A. Engelhard & Sons Company owe a duty to Mackenzie to transfer the stock to Mackenzie when he presented a certificate in December, 1912, standing in the name of F. W. R. Eschmann, and which certificate was not endorsed by Eschmann?

Second. On February 20, 1915, when Eschmann presented the certificate of stock to the corporation, properly endorsed, and asked that it be transferred, did the corporation owe Mackenzie the duty to refuse to transfer it? Eschmann owned the stock and the corporation was not justified in refusing to transfer it upon his request, unless its knowledge of Mackenzie's claim was such as to impose a duty on the corporation to refuse to make the transfer.

Third. After Engelhard & Sons Company had cancelled Certificate No. 24 and issued certificates for the one hundred and thirty shares to other par-

ties on February 20, 1915, did it owe a legal duty to Mackenzie to issue a certificate for one hundred and thirty (130) shares to him when he presented the purported bill of sale on April 20, 1919?

Certain important circumstances, if borne in mind, will serve to differentiate many of the authorities cited on the other side, and will aid the court in arriving at a conclusion.

1. MACKENZIE DID NOT CLAIM TO OWN THE LEGAL TITLE TO THE STOCK, BUT ONLY CLAIMED A LIEN THEREON, AT THE TIME THE STOCK WAS TRANSFERRED TO OTHERS.

2. AT THE REQUEST OF ESCHMANN, THE TRUE OWNER, THE STOCK WAS TRANSFERRED ON THE CORPORATE BOOKS FEBRUARY 20, 1915, THREE AND ONE-HALF MONTHS AFTER THE JEFFERSON CIRCUIT COURT HAD ADJUDGED THAT MACKENZIE HAD NO LIEN, AND WHILE THAT JUDGMENT WAS IN FULL FORCE AND NOT SUPERSEDED.

3. THE BASIS OF THE CORPORATION'S LIABILITY, IF ANY, IS ITS KNOWLEDGE OF MACKENZIE'S CLAIM. WITHOUT SUCH KNOWLEDGE NO LIABILITY COULD ATTACH FOR TRANSFERRING THE STOCK PURSUANT TO THE DEMAND OF THE REAL OWNER. ITS ONLY KNOWLEDGE WAS THAT MACKENZIE HAD CLAIMED A LIEN WHICH THE COURT HAD DENIED.

4. THE ORIGINAL DEBT FROM ESCHMANN TO MACKENZIE IS NOT HERE INVOLVED. MACKENZIE HAS PROVED THAT CLAIM WITH ESCHMANN'S ADMINISTRATORS, BY WHOM IT WILL NO DOUBT BE PAID IF IT HAS NOT ALREADY BEEN PAID. BY THIS ACTION, MACKENZIE SEEKS TO RECOVER JUDGMENT AGAINST THE CORPORATION, THE COLLECTION OF WHICH WILL NOT AFFECT THE CLAIM AGAINST ESCHMANN'S ESTATE.

FIRST POINT.

Refusal to Transfer December 10, 1912.

The first act on the part of the corporation which is complained of is its refusal to transfer the stock to Mackenzie on December 10, 1912, before any suit was brought. Mackenzie, on December 10, 1912, presented to the corporation certificate No. 24 of its capital stock. The certificate bore this endorsement:

> "This certifies that F. W. R. Eschmann is entitled to one hundred and thirty shares of the capital stock of A. Engelhard & Sons Company, transferrable only in person or by attorney on the books of the company, *upon the surrender and proper endorsement* of this certificate" (R., p. 15).

The certificate was not endorsed, and therefore the corporation refused to transfer it. That its refusal under the circumstances was justified, will not

perhaps be questioned. *Tafft* v. *Presidio, Etc., R. R. Co.*, 84 Cal. 131, 24 Pac. 436.

> "If the corporation takes up the old certificate when it is not properly endorsed, and cancels it and makes the transfer on its books to the new transferee, it does so at the peril of having to answer in damages to the real owner of the shares for their conversion in case the transferee had no right to have the transfer made to him."

See *Allmon* v. *Salem Building & Loan Association*, 114 N. E. 170.

We take it that there will be no question raised, but that the corporation was justified in refusing to transfer the stock to Mackenzie on December 10, 1912.

This brings us to the next act done by the corporation, to wit, its action in transferring the stock to McDowell and Mrs. Eschmann, on February 20, 1915, at which time the certificate properly endorsed by Eschmann was presented to the corporation, and the transfer was made at Eschmann's direction.

SECOND POINT.

Transfer February 20, 1915.

BOTH THE CORPORATION AND THE TRANSFEREES WERE ENTITLED TO RELY ON THE JUDGMENT DENYING ANY LIEN TO MACKENZIE AND NEITHER THE CORPORATION NOR TRANSFEREES CAN BE PREJUDICED BY A SUBSEQUENT REVERSAL OF THAT JUDGMENT. THE JUDGMENT PROTECTS RIGHTS ACQUIRED AND ACTS DONE PURSUANT TO IT EVEN THOUGH IT WAS REVERSED AFTER THE ACTS WERE DONE AND RIGHTS ACQUIRED.

It will be recalled that the Jefferson Circuit Court entered a judgment on November 7, 1914, in which it decreed that Mackenzie had no cause of action against Eschmann and no lien on the stock in question, and in which it directed that the certificate of stock be delivered to Eschmann (p. 23). More than two months thereafter, and in January, 1915, Eschmann withdrew the certificate of stock from court, and more than three and one-half months thereafter, to wit, February 20, 1915, Eschmann presented the certificate to the corporation and demanded its transfer. Is the corporation liable for making such transfer? If it is, its liability is, of course, wholly dependent upon its knowledge of the litigation between Mackenzie and Eschmann.

Section 747 of the Civil Code of Kentucky:

> "An appeal shall not stay proceedings on a judgment unless a supersedeas be issued."

By the judgment of November 7, 1914, Mackenzie's lien on the stock had been destroyed. Eschmann was then the owner of the legal title and the title was, by reason of the judgment of the Jefferson Circuit Court, free of lien. Being free of lien, he could transfer an unencumbered title to any purchaser, though a purchaser with notice of that litigation.

We shall assume for the purpose of this brief, that Mrs. Eschmann had knowledge of Mackenzie's claim, as that is the contention of Mackenzie's counsel.

If Mrs. Eschmann and Mr. McDowell acquired a good title to the stock transferred to them, in spite of their knowledge of the suit, then no liability can possibly attach to the corporation for transferring the stock because its knowledge was the same as that of the transferees. On the other hand, if for any reason the transfer was voidable, Mackenzie has not been damaged and the corporation is not liable.

The transferees who took while the judgment of the Jefferson Circuit Court was in effect, took a good title.

Fidelity Trust & Safety Vault Company v. *Louisville Banking Company*, 119 Ky. 675.

Creditors sued the Etheridge Manufacturing Company and levied attachments upon its property. Etheridge, a stockholder and officer of the company, asserted in the creditors' action a mortgage lien, claimed to be superior to the lien of the attaching creditors.

The circuit court adjudged the lien of Etheridge to be superior to the liens of the attaching creditors, and Etheridge, through his attorneys, withdrew the money from court. His attorneys retained a part of the fund for their services and the balance was distributed to other creditors of Etheridge, who had knowledge of the fund from which it was being paid. The attaching creditors appealed to the Court of Appeals of Kentucky and that court reversed the lower court and held that the attaching creditors had a right to the money, their liens being superior to that of Etheridge.

The attaching creditors then sought to make Etheridge's attorney, and his other creditors who had received the money with knowledge of the source from which it came, pay said money into court to be subjected to the attachments. The Court of Appeals on a second appeal held that Etheridge's attorneys and creditors had acquired a good title to the money, which was superior to the liens of the attaching creditors. The contention of the attaching

cerditors is stated by the Court of Appeals as follows:

> "It is the contention of appellee's that they had a lien upon the $6,900 in question, and that the circuit court erroneously adjudged the money to Etheridge, but they contend that such judgment did not destroy or annul their several liens; and inasmuch as the court of appeals reversed the judgment, and adjudged that the lien of the attaching creditors was superior to that of Etheridge, that the lien in fact and in law existed on the fund all the time; hence they argue that these appellants having received that identical money, that they were in law bound to repay the same under and in accordance with the rules issued as aforesaid."

The contention of the attorney for Etheridge and his other creditors who had received the fund, is thus stated:

> "And it is further contended that inasmuch as Etheridge, under the judgment of the trial court in the original case, was adjudged the money and the same paid to him, and by him to these appellants as aforesaid, that they are under no legal obligation to refund the same, and that the attaching creditors must look alone to Etheridge."

The case seems to us identical in principle with the one at bar. The lien of the attaching creditors was held to be ineffective and the fund delivered to Etheridge free of lien. In the case at bar it was held that Mackenzie had no lien on the stock, and the certificate was delivered to Eschmann. Etheridge paid

the money to his creditors who had knowledge of the suit. Eschmann delivered the stock to persons having knowledge of the suit. The Court of Appeals in reversing the Etheridge case, held that the attaching creditors' lien was good just as the Circuit Court upon reversal in this case held that Mackenzie's lien was good. In neither case can the right arising from the subsequent judgment after reversal affect the rights of third persons though with notice.

This case is sought to be distinguished because money is negotiable and certificates of stock are not negotiable. The distinction must fail for two reasons: First, the negotiability of the thing transferred is wholly unimportant in either case because in both cases the transferees had knowledge of the facts. A transferee of a negotiable instrument having knowledge of the facts relied on to defeat his title takes no higher title than a transferee of a non-negotiable instrument. Second, the Court of Appeals of Kentucky distinctly held in the Etheridge case that the negotiability of the fund had nothing to do with the decision.

> "If, instead of the $6,900 being in money, there had been a contest between Etheridge and the other attaching creditors as to a lien upon personal property, for instance, horses and cattle, then in the custody of the court's receiver, and the court had denied any lien to the attaching creditor and adjudged the property to Etheridge, *it would seem that he could sell it and pass good title thereto at any time while such judgment was in force.*"

That language of the Court of Appeals fits this case precisely.

The Court of Appeals concluded:

> "The duty of Etheridge to refund the money is not disputed and it seems to us that these appellees must look alone to Etheridge for relief or restitution."

Mackenzie claimed a lien by virtue of a pledge. Had there been no pledge and had he simply instituted suit upon the note he could have procured an attachment and acquired a lien on this stock by serving the corporation as garnishee (Civil Code of Ky. 203). Had the petition been dismissed, as it was, the transferees of the stock would have taken good title. The case would then have been absolutely identical with the Etheridge case. We submit that no logical distinction can be made between a lien claimed by virtue of an attachment and a lien claimed by virtue of a pledge, in so far as the rights of third persons are concerned, acquired in reliance on a judgment denying the existence of the lien.

The Bank of United States v. *Bank of Washington,* 6 Peters (8 U. S.), 19, 8 L. Ed. 299.

Triplett & Neale recovered a judgment against the Bank of Washington, and being indebted to the Bank of the United States authorized the Bank of the United States to collect the amount of the judgment from the Bank of Washington, and to credit

the amount collected upon the indebtedness of Triplett & Neale to the Bank of the United States.

The Bank of Washington paid the fund to the Bank of the United States, but notified the Bank of the United States when so doing that it was its purpose to appeal from the judgment and that if the case should be reversed, it would look to the Bank of the United States to refund the money. The case was reversed and the Bank of Washington undertook to recover the sum paid to the Bank of the United States, but this court held that no such recovery could be had, using this language:

> "That the Bank of Washington, on the reversal of the judgment of Triplett & Neal, is entitled to restitution in some form or manner is not denied. The question is whether recourse can be had to the Bank of the United States, under the circumstances stated in the case agreed. When the money was paid by the Bank of Washington, the judgment was in full force, and no writ of error allowed, or any measures whatever taken, which could operate as a supersedeas or stay of the execution. Whatever, therefore, was done under the execution towards enforcing payment of the judgment, was done under authority of law."
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> * * * * * * *
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> "If the marshal might have sold the property of the bank and given a good title to the purchaser, it is difficult to discover any good reason why a payment made by the bank should not be equally valid, as it respects the rights of third persons. In neither case does the party against whom the erroneous judgment has been enforced, lose his remedy against the party to the judg-

ment. On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution without a *scire facias,* when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored. (2 Salk. 587; Tidd's Prac. 936, 1137, 1138). And, no doubt, circumstances may exist where an action may be sustained to recover back the money. (4 Cowen, 297.) *But as it respects third persons, whatever has been done under the judgment whilst it remained ni full force is valid and binding. A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future day be reversed, it would virtually, in many cases, amount to a stay of proceedings on the execution. No such rule is necessary for the protection of the rights of parties.* The writ of error may be so taken out as to operate as a supersedeas. Or, if a proper case can be made for the interference of the Court of Chancery, the execution may be stayed by injunction."

On the question of notice, the Court used this language:

"But the answer to the argument is that no notice whatever could change the rights of the

parties, so as to make the Bank of the United States responsible to refund the money. *When the money was paid there was a legal obligation on the part of the Bank of Washington to pay it, and a legal right on the part of Triplett & Neale to demand and receive it, or to enforce payment of it under the execution. And whatever was done under the execution, whilst the judgment was in full force, was valid and binding on the Bank of Washington SO FAR AS THE RIGHTS OF STRANGERS OR THIRD PERSONS ARE CONCERNED. The reversal of the judgment cannot have a retrospective operation, AND MAKE VOID THAT WHICH WAS LAWFUL WHEN DONE.* The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and as between the parties to the judgment there is all the privity necessary to sustain and enforce such right; but as to strangers there is no such privity, and if no legal right existed when the money was paid to recover it back, no such right could be created by notice of an intention so to do."

The court points out forcefully that certain methods are provided by which litigants may stay proceedings under judgments pending appeals and that in the absence of such stay, persons acting pursuant to said judgments are protected and subsequent reversals do not affect their rights. Otherwise no one could safely rely on any judgment until the time for appeal, which in some cases is as long as twenty years, has expired. See Ky. Civil Code 745.

That language of this court meets every contention advanced in this case. Admitting that McDowell and Mrs. Eschmann knew of the litigation, the fact is that they took title at a time when the title of Eschmann to the stock was free from encumbrance by virtue of the judgment of the Jefferson Circuit Court. The notice, therefore, that Mackenzie might appeal and get that judgment reversed could not be made to take the place of a supersedeas bond. When the case was reversed and the new judgment entered, Mackenzie acquired a perfectly valid right as against Eschmann, but no right as against Eschmann's transferees.

A more recent decision of this court illustrates the same principle.

Fidelity Mutual Life Insurance Company v. *William H. Clarke,* 203 U. S. 64, 51 L. Ed. 91; opinion by Justice Holmes.

Mrs. Mettler sued the insurance company to recover on a policy of insurance issued by the company upon the life of one Hunter. The insurance company defended upon the ground that Hunter was not dead. Mrs. Mettler assigned parts of her interest in the policy to her counsel in the case and to other persons. Judgment being rendered in favor of Mrs. Mettler, the insurance company paid the money into court and it was turned over to the several persons entitled thereto, including Mrs. Mettler, her attorney, and others.

The insurance company then learned that Hunter, the insured, was alive, and that the claim had been made by fraud and the company sought to upset the judgment because it was procured by fraud, and to recover the money paid thereunder to Mrs. Mettler and her assignees.

The court assumed for the sake of the opinion that the judgment could be set aside for fraud, but held that the assignees of Mrs. Mettler were entitled to retain the money received, saying:

> "We are of opinion that appellees are entitled to keep their money, even if the judgment can be impeached for fraud."

In passing on the case the court used this language:

> "They all got the legal title to the money which was paid to them, or, what is the same thing, got the title transferred to their order; that being so, the appellant must show some equity before their legal title can be disturbed."

So in the case at bar, Mr. McDowell and Mrs. Eschmann acquired legal title and the question is, can their title be impeached by reason of their notice of the pending suit? As to that notice the court said:

> "The appellant is driven, therefore, to contend as it did contend at the argument, that notice of the denial that Hunter was dead, in the suit on the policy, was notice of the fraud. But it is admitted that the appellees all acted in good

faith; that they believed the plaintiff's case. In such circumstances, even if the answer had gone further, and had charged the plaintiff with all that the present bill charges against her, when a jury had decided that the charges were groundless, a judgment had been entered on the verdict, and the insurance company had accepted the result by paying the money into court without waiting for an execution, *it would be impossible to say that the supposed notice was not purged.* The appellees were not bound to contemplate future discoveries of what they honestly believed untrue, and a bill to impeach the final act of the law. See Bank of United States v. Bank of Washington, 6 Peters, 8, 19, 8 L. Ed. 299, 304."

So here. The only notice chargable to McDowell and Mrs. Eschmann was notice that Mackenzie had claimed a lien which had been held invalid by the court. They did not know that that judgment was erroneous and would be reversed. In the insurance case, the recipients of the fund knew that the insurance company claimed the insured was not dead, but they did not know that to be a fact.

The insurance company contended in that case, as Mackenzie contends here, that the title of the transferees to the money depended upon a judgment and that as the judgment must fail because of fraud, therefore the title based thereon must fail. The court answered that contention in this language.

"It is said that the title of the appellees stands on the judgment, and that if the judgment fails the title fails. But that mode of statement is not sufficiently precise. The judgment hardly

can be said to be part of the appellee's title. It simply afforded the appellant a motive for its payment into Court. The appellees derive their title immediately from Mrs. Mettler, and remotely from the act of the appellant. They stand exactly as if the appellant had handed over the $24,000.00 in gold to her and she thereupon had handed their proportion to them. We are putting no emphasis on the fact that the thing transferred was money. The appellees knew from what fund they were paid, from what source it came, and why it was paid to Mrs. Mettler. We are insisting only that the title had passed to them. But we repeat that, as the title had passed, the appellant must find some equity before it can disturb it, and we now add that, as there is no question that the appellees took for value, that is, in payment for their services, or, if it be preferred, in performance of Mrs. Mettler's contingent promise, the equity must be founded upon notice.

"The notice to be shown is notice of the fact that the judgment which induced the appellant's payment was obtained by fraud."

That case is sought to be distinguished from the case at bar on the ground that it was money that was transferred but Mr. Justice Holmes pointed out, as did the Kentucky Court of Appeals, in the Etheridge case, that the fact of the thing being money was of no significance as the parties took with notice.

"We are putting no emphasis on the fact that the thing transferred was money. The appellees knew from what fund they were paid, from what source it came, and why it was paid to Mrs. Mettler."

We take it that the case is not to be distinguished because the judgment was attacked for fraud whereas in the case at bar the judgment was simply erroneous and reversed. In both instances, the judgment fails.

Referring again to the case of *Fidelity Trust & Safety Vault Company* v. *Louisville Banking Company,* 119 Ky. 675, we call the court's attention to the following quotation, quoted by the Kentucky Court, from an opinion by the New York Court in the case of *Langley* v. *Warner,* 3 N. Y. 327.

> "The case then comes to this: The money in question, in the regular course of judicial proceedings, came to the hands of the defendant as the attorney of Walsh; and on the subsequent settlement between them the money was passed to the creditor, Walsh, on account of his indebtedness to the defendant. It was the same thing in effect as though the defendant had first paid over the money to Walsh, and the latter had then repaid it to the defendant in satisfaction of his debt. About two months afterwards the judgment was reversed and restitution was awarded to the plaintiffs against Walsh. It was very proper that he should make restitution for he had in effect received the money and applied it to the payment of his debt. The plaintiffs proceeded to execution against Walsh, in pursuance of the judgment for restitution, but failing in that, they now seek to recover the amount from the defendant. I see no principle on which the action can be maintained. The defendant has got none of the plaintiff's money; he has got nothing but his own. Walsh had a perfect title to the money when it was collected, just as per-

fect as it would have been if no *certiorari* had been issued. He had a right to do what he pleased with the money; and he made a very proper use of it by paying his debt. *The plaintiffs have taken up the strange notion that because they were trying to get the judgment reversed, Walsh could not give a good title to the money, especially if he paid it to one who knew what they were doing. I am not aware of any foundation for such doctrine. As Walsh had a good title to the money he could, of course, give a good title to the defendant, or any one else. No one was bound to presume that the judgment of a court of competent jurisdiction was erroneous and would be reversed. The legal presumption was the other way—that the judgment was right and would be affirmed.*"

Wood's Administrator v. *Nelson's Administrator*, 9 B. Monroe, 600.

A judgment of the Probate Court admitted a will to probate. While proceedings were pending in the Circuit Court to reverse the judgment admitting the will to probate, the executor appointed by the will sold certain slaves under authority of the will, and thereaffter the judgment probating the will was reversed. The court held that both the executor and the purchaser of the slaves were protected by the probate judgment, saying:

"The general principle with regard to the validity of acts done under a valid judgment, while it remains in force and unsuspended is, that they are not invalidated by a subsequent reversal. And this principle has been considered as being essential to the safety of the community, and as

due to the confidence which they have a right to repose in the efficacy and authority of judicial proceedings."

The text writers sustain the rule:

37 Cyc. 602:

"Whatever is lawfully done under the judgment before the supersedeas takes effect is valid, and must stand."

The same proposition is laid down in 2 Ruling Case Law, page 273, paragraph 226:

"General Effect of Reversal as to Third Persons—When the court has jurisdiction of the parties and the subject-matter, *acts performed and rights acquired by third persons under its judgment or decree must be sustained, notwithstanding a subsequent reversal.* Thus the reversal of a judgment appointing a syndic, or receiver, does not operate retrospectively, and avoid his acts done while the judgment was in force. So, where a judgment is not superseded pending an appeal or writ of error, an execution may lawfully issue thereon, the officer is justified in proceeding regardless of the proceeding for review and is not deprived of the protection of his process by the subsequent reversal of the judgment. *Where by virtue of a judgment a party in whose favor it was rendered receives money, which he subsequently pays over to his creditors, upon reversal the latter cannot be required to make restitution.*"

Under the heading "Restitution on Reversal," the same text-book on page 291, Sec. 245, says:

"The general principle is well settled that a subsisting judgment of a court which had juris-

diction of the parties and subject-matter is binding, at least on all who were parties; and constitutes a sufficient justification for all acts done in its enforcement until it is reversed or set aside by competent authority."

Consequently Mackenzie was bound by the judgment of the court permitting Eschmann to withdraw the stock and his alleged lien was lost thereby. His only chance to save it was to supersede that judgment.

Hey v. *Harding*, 25 Ky. L. Rep. 1454, 78 S. W. 136.

Hey sued Harding on a note and attached certain horses belonging to Harding, thus acquiring a lien on the horses. The horses were sold before judgment in the lower court and Mrs. Harding, defendant's wife, became the purchaser and executed bond for the purchase price.

June 13, 1896, the lower court decided the case in favor of Harding and discharged the attachment. Harding in exactly one week, to wit, June 20, 1896, entered an order acknowledging satisfaction of the sale bond executed by his wife.

July 9, 1896, less than one month from the date of the judgment Hey executed a supersedeas bond and took the case to the Court of Appeals, which reversed the judgment and directed that judgment go against Harding and *that the attachment be sustained.*

The attachment being sustained, of course Mrs. Harding was liable on the bond, except for the fact that she had been released therefrom by her husband before the judgment was superseded. The court held that the judgment of the lower court destroyed the lien of the attachment and that Harding had a perfect right, therefore, to release the purchase money bond as the judgment was not superseded at the time of his release. The case would have been precisely the same had the horses not been sold under the attachment but had been sold and delivered to Mrs. Harding by her husband between the time the lien was discharged and the time the supersedeas bond was executed. The court said:

> "Section 747. An appeal shall not stay proceedings on the judgment unless supersedeas be issued.
>
> "The judgment discharging the attachment under Section 228 of the Code, entitled Harding to the return of the attached property, or its proceeds. If appellant desired to prevent this from being done, it was incumbent upon him to supersede the judgment. Having failed to do this, Harding became entitled to the proceeds of the sale of the attached horses. As this was made to him before the supersedeas, the appeal of the supersedeas afterwards had no retroactive effect upon the validity of the payment. In the case of Runyon v. Bennett, 4 Dana, 598, it was said: 'A supersedeas suspends the efficacy of the judgment, but does not, like a reversal, annul the judgment itself. Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation

such as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual. A consequence of this is, that whatever is done under the judgment, after and while it is superseded being done without authority from the judgment which is then powerless and against the authority and mandate of the supersedeas should be set aside as improperly and irregularly done; *but that whatever is done according to the judgment before the supersedeas takes effect is upheld by the authority of the judgment and is not overreached by the supersedeas.*"

See also *Garret* v. *Jensen* (Cal.), 186 Pac. 156.

In other words, it is the rule in the Court of Appeals of Kentucky, and it is the rule in the Supreme Court of the United States, and in many of the State courts, that if the judgment discharges a lien the owner of the property pending an appeal without supersedeas can transfer same to a purchaser who will take a good title free of the lien.

If the plaintiff who claims the lien wants to retain his rights he must execute a supersedeas bond. The courts in the above quotations have pointed out how inconvenient a contrary doctrine would be. To hold to the contrary in this case amounts to a holding that in spite of the successful termination of the action in the lower court, Mackenzie had a right to prevent Eschmann from transferring his property for four years at least. He could wait two years to take his appeal and it takes two years to get a case decided in the Court of Appeals, as is evidenced by this very

case. Such a result is squarely in the teeth of Section 747 of the Civil Code of Kentucky, which requires the execution of a supersedeas bond to stay the enforcement of a judgment.

Without running the risk of rendering himself liable on such a bond for the 10% penalty prescribed by the Civil Code, Mackenzie has obtained the full benefit of a supersedeas by the judgments of the lower courts in this case.

Maxwell v. *Bank of New Richmond,* 77 N. W. 149, 101 Wisc. 286.

Hicks mortgaged his property to Simonton as trustee to be by the trustee sold and the proceeds distributed among certain creditors of Hicks. The plaintiff sued Hicks and served Simonton as garnishee, thereby acquiring a lien upon the property of Hicks in the hands of Simonton. Simonton answered as garnishee and the attachment was discharged, but an appeal was immediately taken without supersedeas. Pending the appeal Simonton sold the property and distributed the proceeds among those creditors of Hicks named in the mortgage. The case was reversed, the court holding that the plaintiff by his attachment acquired a good lien on the property of Hicks in the hands of Simonton. Upon the return of the case to the lower court, an attempt was made to hold Simonton liable, together with the creditors of Hicks who had received the proceeds of the property pending the appeal.

The court held, however, that when the attachment was discharged and the effect of that judgment was not stayed by supersedeas, Simonton had a perfect right to deal with the property as if there were no lien thereon and the creditors of Hicks had a perfect right to receive the proceeds of such property and neither Simonton nor such creditors could be made to refund the sums received.

> "It follows that if a judgment be rendered in the court of original jurisdiction in favor of the garnishee, and the lien of the plaintiff be not continued pending an appeal or review on writ of error, and the garnishee treat the property sought to be reached as free from the equitable lien pending the proceedings, and by reason of a reversal of the judgment the cause proceeds to a new trial, *he should be allowed to plead the disposition of the property while discharged of the lien, as a defense.* Webb v. Miller, 24 Miss. 638.
>
> "The result of the application of the principles stated in the foregoing, to the case before us, is that *the defendant came rightfully into possession of the money received from Simonton, has a right to retain the same, and that plaintiffs have no claim thereto* whatever. The judgment in favor of Simonton discharged the equitable lien of plaintiffs, and it was not revived by a reversal of the judgment to the prejudice of the garnishee defendant or those dealing with him. The lien not being continued pending the appeal, it was lost beyond recovery by the disposition of the property pursuant to the judgment discharging the garnishee. The judgment of the trial court to the contrary was erroneous and must be reversed."

In the case at bar when the lien was destroyed by the judgment of the lower court, the corporation, which was in the same position as Simonton, the trustee, in this case, had a perfect right to deal with the property as if there was no lien and so did the transferees from the defendant, Eschmann.

It is the general rule that where a lien is procured by an attachment, and that lien is discharged by the judgment of the lower court, persons in possession of the property are entitled to and are required to deal with the property as if there were no lien.

Stephens, Judge, v. *Willis,* 21 Ky. L. Rep. 170 (*Infra.*).

2. MACKENZIE'S CASES DISTINGUISHED.

Mackenzie relies on the following Kentucky cases: *Clarey* v. *Marshall,* 4 Dana, 95; *Golden* v. *Riverside Coal & Timber Co.,* 184 Ky. 200; *Webb* v. *Webb's Guardian,* 178 Ky. 152; and the Illinois case of *Miller* v. *Doran,* 245 Ill. 200; 91 N. E. 1039. None of these cases is at all similar to the one at bar.

2. (a) *Clarey* v. *Marshall,* 4 Dana, 96 (1836).

Marshall contracted to sell Edmondson 5,000 acres of land. Edmondson sued Marshall asking that Marshall be specifically directed to convey the 5,000 acres to Edmondson. By error the commissioner conveyed 5,559 acres. The heirs of Marshall "who had been non-residents and infants, filed a bill of review for

correcting the decree, for errors on its face, so as to reduce the quantity of land conveyed to 5,000 acres, conformable with their father's obligation."

The court held that Edmondson never acquired a good title to the extra 559 acres and that purchasers from him took only the title he had which was no title so far as the 559 acres was concerned. The case did not involve the rights acquired by a purchaser pending an appeal. There was no appeal.

Section 747 of the Civil Code as to the effect of appeals without supersedeas had not been passed. The purchase was made pending the hearing on the "bill of review" which suspended the effect of the judgment (Eastman v. Amoskeag, 47 N. H. 71); but an appeal, or the right to appeal, in no wise suspends the effect of a judgment unless a supersedeas is issued, as provided by Section 747 of the Civil Code.

Webb v. *Webb's Guardian,* 178 Ky. 152.

The sole and only point decided in this case was that a purchaser at a judicial sale of land takes a good title even as against infant defendants and even though the judgment of sale was erroneous and was afterwards reversed. This case involved the rights of a purchaser at a judicial sale; it sustained the rights of the purchaser, and is no authority at all upon the rights of one who purchases at a private sale from a defendant whose property has been adjudged to be free of lien.

Golden v. *Riverside Coal & Timber Co.*, 184 Ky. 200.

This case involved the rights of a purchaser from a defendant whose title was held good by a Circuit Court, but there are two reasons why the case is not in point here.

First, the purchase was made from the defendant *before the judgment of the Circuit Court was entered.*

The purchaser, the Riverside Coal Company made a contract to purchase the property on September 3, 1912, and the judgment of the Circuit Court upon which it relied was not entered until September 27, 1912. The court in its opinion said: "On the 23rd day of September, 1912, and before the judgment which was appealed from had been rendered," the purchase was made.

In the *second* place, a supersedeas bond was actually executed upon the day after the judgment was entered and before the deed was delivered or money paid.

> "This judgment was rendered on the 27th day of September, 1912, and Golden prayed and was granted an appeal from the judgment to this court. On the following day he attempted the execution before the clerk of the Circuit Court of a supersedeas bond, and thereafter perfected the appeal."

The court's statement that Golden "attempted" the execution of a supersedeas bond is not altogether clear. As a matter of fact, he did execute such a bond and that fact was stipulated by the parties in the

case as appears from the record in that case now on file in the office of the clerk of the Court of Appeals of Kentucky at pages 91 and 92.

In short, the statements relied on from the Kentucky cases were pure *dicta.*

2. (b) The Illinois rule sustains the position of A. Engelhard & Sons Company.

Miller v. *Doran*, 245 Ill. 200, 91 N. E. 1039.

Birdie Doran owned stock in the U. S. Steel Corporation. Her husband wrongfully abstracted the certificates from her box and pledged them for his own debt with Miller & Co.

Miller & Company sent the stock to the Steel Company for transfer upon its books, and that transfer being refused, Miller & Co. sued the Steel Company and Birdie Doran, asking that it be adjudged to be the owner of the stock and that the corporation be required to transfer the same.

The judgment declared Miller & Company to be the owners and ordered the transfer. Before Doran appealed, Miller & Company filed a replevin suit and secured possession of the certificates from the Steel Company. Then Miller again presented the certificates to the Steel Company and it transferred same first to Miller & Company and *later to innocent purchasers.* Doran then perfected her appeal. The case was reversed and the stock ordered transferred to Birdie Doran. The Steel Company defended against

any liability on the ground that it had transferred the stock pursuant to the judgment of the lower court. The court held:

> "The first decree entered in this case and under which the corporation claims to have transferred said stock and delivered same to L. D. Miller & Company has been reversed, *and said corporation were parties to the case in which said decree was entered,* and they are bound by the reversal of said decree and cannot justify the transfer and delivery of said stock by reason of said decree.
>
> "It is not denied by the corporations that the general rule that parties to a suit are bound by a reversal of a decree is as announced in Ure v. Ure, 223 Ill. 454, 79 N. E. 153, 114 Am. St. Rep. 336, where it was held that the effect of reversing a decree is to abrogate the decree, and that thereafter the cause will stand in the trial court precisely as it did before the entry of the decree, *and that a party to the record cannot acquire any right based upon such erroneous decree which he can assert subsequent to its reversal.*"

The court in its opinion cited the case of Hay v. Bennett, 153 Ill. 271, 38 N. E. 645, where an administrator, pursuant to a judgment of court paid money to a third party, but the judgment was reversed and the administrator was held liable for the $3,500.00.

The court in the Doran case referring to the administrator case says, "The administrator having been a party to the suit in which the original decree was entered, he was bound to know that proceedings were legal and free from error, and that, the decree

having been reversed he was bound by such reversal and that he could not defend against the repayment of said sums of money by virtue of said reversed decree, although he had paid the money relying upon the decree while the same was in force and unreversed."

The case differs from this in the following particulars:

(1) Engelhard Company was not a party to the suit.

(2) Doran owned this stock and therefore no one else had the right to transfer it, whereas, Mackenzie only claimed a lien on the stock and its true owner had a perfect right to transfer it.

(3) The transfer was the proximate cause of the loss as the stock by reason of the transfer had gotten into the hands of purchasers for value.

(4) Even if the case were thought to be analogous, it is no authority here for it is based upon the rule peculiar to Illinois, that a judgment which is subsequently reversed furnishes no protection whatever to a *party to the litigation,* for acts done under the judgment while it was in force. The Court of Appeals of Kentucky in the case of *Bridges* v. *McAllister,* 106 Ky. 791, points out that the Illinois rule in this respect is peculiar.

> "The opinion is supported only by some cases in Illinois and California and is contrary to the rule followed by the United States Supreme Court and all other State courts so far as we have seen."

However, the Illinois case was based entirely upon the fact that the corporation was a party to the ac-

tion and that a party to an action must know that the decision of the lower court is erroneous, if it is erroneous. The Illinois Court, if the corporation had not been a party to the action, would clearly have decided the case in favor of the corporation.

Ure v. *Ure,* 223 Ill. 454, 75 N. E. 153.

One-half of certain property was left to John; the other half to Robert for life, the remainder to Robert's children. The lower court decided that Robert took an estate in fee in his one-half. Robert then sold a part of his one-half of the property to John, who sold same to third persons; and Robert sold additional parts of his one-half to third persons. After reversal, it was held that John, being a party to the action, must restore to Robert so much of Robert's property as remained in John's hands, and must account for so much thereof as he had sold to third persons. As to third persons, both those who had purchased from John and those who had purchased from Robert at the time when the judgment of the lower court apparently invested Robert with a perfect title they had by their purchases acquired a good title, because they were not parties to the record.

> "A party to a suit is presumed to know of all the errors in the record, and such party cannot acquire any rights or interests based on such erroneous decree that will not be abrogated by a subsequent reversal thereof. If such party has received benefits from the erroneous decree or

judgment, he must, after reversal, make restitution, and, if he has sold property erroneously adjudged to belong to him, he must account to the true owner for the value. Titles acquired by parties to the record under an erroneous decree or judgment will be divested by the subsequent reversal of such decree or judgment, but a different rule applies where a stranger to the proceeding, without notice, acquires rights under the decree before reversal. His title will not be affected. Innocent third parties have a right to rely upon a judgment or decree of a court having jurisdiction to pronounce it. They are not required to look beyond the question of jurisdiction, and if the decree is one whch the court has jursdiction to render, both as to the subject-matter and the parties, innocent purchasers acting in good faith will be protected, notwithstanding the subsequent reversal of the decree or judgment. Montanye v. Wallahan, 84 Ill. 355; Thompson v. Frew, 107 Ill. 478; Crawford v. Thomson, 161 Ill. 161, 43 N. E. 617."

Chicago & N. W. Railroad Company v. *Garret,* 239 Ill. 297, 87 N. E. 1009.

Mrs. Chatterton owned certain property, and she procured a divorce from her husband. By the terms of the divorce decree the husband's dower interest was destroyed. Mrs. Chatterton or her heirs sold the property to purchasers, who were aware of the fact that the case was pending on writ of error in the Appellate Court. Thereafter, the case was reversed, the Appellate Court holding that Chatterton's dower interest remained in the property; but upon suit by Chatterton against the purchasers, it

was held that the purchasers, who purchased, when, according to the judgment of the lower court, in the divorce action, Mrs. Chatterton or her heirs had a perfect title, could not be deprived of their title by Mr. Chatterton:

> "Assuming, but not deciding, that appellants had notice of the pendency of the writ of error, we are brought to the question whether they took subject to the final disposition of the case. The writ of error was not a supersedeas. The decree was therefore not affected by it, but, until the judgment of reversal was rendered, was valid and effectual, entitled to full faith and credit in all courts, and enforcible by all appropriate means. Had it required the payment of alimony, such payment might have been enforced by execution or attachment in spite of the pendency of the writ of error. * * * *Without such supersedeas, the doctrine of lis pendens has no application to a writ of error. Everybody was entitled to act upon the decree as a valid decree, and rights acquired in good faith by strangers to the decree whether with or without notice of the writ of error, cannot be affected by its reversal. The title of the appellants, Jones and Strickler, was not, therefore, subject to appellee's claim of dower.*"

These cases hold that even where real estate is involved, if same is adjudged to belong to A. and that judgment is not superseded, a purchaser from A, though with full knowledge of the pendency of a writ of error, acquires a good title.

The statement is sometimes seen that a purchaser pending an appeal is a purchaser *pendente lite*. Be-

fore the Codes a defeated litigant had an absolute right to appeal, and upon the appeal his case was tried by the Appellate Court *de novo* without any regard for the decision of the lower court. (3 C. J. 315.) The appeal removed the entire case to the Appellate Court. An appeal then served the same function as the motion for new trial serves now, except that the new hearing was before a new court, and the new trial was allowed as a matter of right. Obviously, pending the appeal, the purchaser did purchase *pendente lite* because the case was simply waiting another trial, just as now after a motion for a new trial is sustained. The Code changes all that. The purpose of an appeal is to correct the errors of the lower court. Section 747 of the Code was adopted for the very purpose of enabling the successful litigant to get the fruits of his victory pending an appeal, unless prevented from so doing by a supersedeas.

(3) THE TRANSFER BY THE CORPORATION ON FEBRUARY 20, 1915, WAS JUSTIFIED BY THE THEN SUBSISTING JUDGMENT. A SUBSEQUENT REVERSAL OF THAT JUDGMENT COULD NOT RENDER THAT ACT TORTIOUS.

The corporation which was not a party to the litigation in the lower court cannot be held liable for a tort in doing an act which, when done, was justified by a subsisting judgment. The judgment of the Cir-

cuit Court, if right, justified the transfer of the stock. The act done in 1915 could not become tortious by reason of the reversal of the judgment in 1917.

Bridges v. *McAllister,* 106 Ky. 791.

The parties to the litigation owned adjoining farms. If a certain ditch was left open, Bridges land was flooded, and if closed, McAllister's land was flooded. McAllister was opening the ditch when Bridges sued to enjoin its opening and the lower court ordered McAllister to fill the ditch up again which he did, thus causing his land to be flooded. The Court of Appeals then reversed the decree, holding that the ditch should be left open and McAllister sued for damages caused by the overflow on his land while the appeal was pending. The court held that McAllister could have superseded the judgment and avoided the damages, but, having not done so, he could not hold Bridges liable for tort.

> "The main question arising on this appeal is as to the effect of the reversed judgment on acts done under it and in obedience to it before its reversal, when it was not superseded. In Freeman on Judgments, Section 482, it is said:
>
> " 'But a subsisting judgment, though afterwards reversed, is a sufficient justification for all acts done by plaintiff in enforcing it prior to the reversal.' "

Later the Court says:

> "The same principles are laid down in Black on Judgment, Sections 170, 355. In Kaye v.

Kean, 18 B. Mon. 839, Kean obtained a mandamus against Kaye, which he refused to obey, and, being imprisoned for disobedience, brought suit against Kean, upon a reversal of the judgment awarding the mandamus, for damages for his imprisonment. His petition was dismissed.

The court said:

"'The judgment of the Circuit Court was not void, but merely erroneous. * * *

"These cases proceed upon the principle that what was lawful when done does not become unlawful by reason of subsequent acts. The chancellor in entering the judgment in the case referred to, did not act as the agent of either of the parties.

* * * * * * *

"We have been referred to no case, and can find none, where an action for damages has been sustained upon the reversal of a judgment for acts done pursuant to it, as for a tort. The facts that there are no precedents for such recovery seems at this day conclusive that it has not been recognized as admissible by either the bench or the bar. When a judgment is reversed, restitution must be made of all that has been received under it, but no further liability should in any case be imposed. The case of Hays v. Griffith, 85 Ky. 375 (3 S. W. 341, and 11 S. W. 306), is not supported by the weight of authority and cannot, in our judgment be maintained on principle, so far as it lays down a greater liability.

* * * * * * *

"Appeals may be taken from judgments, ordinarily, within two years, but sometimes within five or twenty years, and it would often produce intolerable hardship to hold a litigant responsible for the consequences of an erroneous judg-

ment under such circumstances. The object in having trust estates, including those of descendants, or those assigned for the payment of debts, settled in equity under the direction of the chancellor, is to protect the parties in the payment of the money, as well as to secure to every one his rights. A creditor with a small claim, who moved for a distribution of the fund, would, under the rule referred to, be responsible for the entire fund under a reversal of the judgment, although he had received only a few dollars of it. Such a rule would destroy all confidence in judgments of courts, and make them the prolific parent, in many cases, of ruinous litigation."

(4) ONE WHO ACTS IN A MANNER JUSTIFIED BY A SUBSISTING AND UNSUPERSEDED JUDGMENT IS PROTECTED BY SAID JUDGMENT, EVEN THOUGH THE ACT IS NOT DONE BY *COMPULSION* OF THE JUDGMENT.

But it is said the rights protected are only those done by compulsion of the judgment and that the judgment in this case did not direct Engelhard to do anything. A distinction is sought to be made between acts done by *compulsion* of the *judgment* and those done by *permission* of the judgment, but the distinction fails.

Porter v. *Small* (Ore.), 120 Pac. 393, 4 L. R. A. N. S. 1197.

The parties were all in one irrigation district. Small, a defendant, in a pending action, was adjudged to be entitled to use 650 inches of the waters

of Silver Creek, and in reliance on that judgment, he continued to use 650 inches or so much thereof as he wanted.

The appellate court upon appeal held that Small was entitled to use only 40 inches of the water. By reason of Small's excessive use of water, pending the appeal, the other users had been damaged and sued Small for those damages. The Oregon court stated the contentions of the parties as follows:

> "If the modification of the decree by this court restores all parties to their original status, and attaches to all acts done in pursuance of it the same wrongful character which they would have possessed had no such decree been rendered, then defendant is a trespasser *ab invito,* and the demurrer was not well taken. If, on the other hand, the decree of the circuit court was valid until reversed, and the defendant had a legal right to rely upon the correctness of it, his act in pursuance of it, if then lawful, will not become a tort by reason of a modification of the decree by an appellate court."

After reviewing the authorities at length, the court concluded that Small was not liable in tort for acting as the judgment of the lower court justified him in acting as long as it was in force. The opinion of the court concludes with this language:

> "Plaintiffs did not seem to have such confidence in the merits of their appeal as to be willing to take any chance of paying damages in case it should be adjudged groundless, and they should not now be permitted to mulct Small in *damages because he was not wiser than the Cir-*

cuit Court, and did not know the law which this court consumed 125 pages of the Oregon reports in explaining.

"It is often said that there is no wrong without a remedy, and, while this is generally true, a remedy may be lost by inaction or want of diligence; and if we concede that it was wrong for defendant to assume that the circuit court had properly adjudged the law, we have already indicated that plaintiffs had it in their power to minimize the effects of that wrong by giving a proper undertaking, or by applying to this court for an injunction. But we are not prepared to say that defendant, under the circumstances, was guilty of an actionable wrong.

"The defendant had the right to indulge *in this presumption that the judgment was right, and if his act was not a tort when performed it cannot become a tort by relation, upon reversal of the decree.*"

Hall v. *Smith-McKenney Co.*, 162 Ky. 159:

"And everything that is done under the judgment before it is superseded will be valid—

"When the judgment is so superseded, what has been done under it which was legal when done is not thus rendered illegal."

Stephens County Judge v. *Willis*, 21 Ky. Law Rep. 170, 51 S. W. 9.

Willis sued Baker and served the Board of Commissioners of Kenton County as garnishees, thereby attaching funds then in the hands of the garnishees and owed Baker. The suit was tried and judgment rendered for defendant. Thereupon, the Board of Commissioners paid to Baker the money

which it owed to Baker. In the meantime Willis had appealed from the judgment but did not supersede same until after the Commissioners made the payment to Baker. The case was reversed by the Court of Appeals and it was held that judgment should have gone for Willis in the lower court and his attachment should have been sustained. He then sought to hold the Board of Commissioners liable for the funds which they had paid out to Baker. But the Court of Appeals of Kentucky held that they had paid out these funds at a time when, according to the judgment of the Circuit Court, Willis had no lien on such funds and that they were not liable upon a reversal of said judgment to pay the funds to Willis.

> "When the judgment of October, 1892, was rendered, dismissing the petition of Willis, it had the effect to discharge the attachment (Sections 228 and 260 of the Civil Code of Practice), and if Willis desired to suspend the operation of that judgment he could have only done so by the execution of a supersedeas bond. This he did not attempt to do for more than twelve months after the entry of the judgment, and after the commissioners had paid to Baker the fund attached in their hands. The reversal by this court of the judgment in that case, upon the question of partnership between Baker and Willis, does not affect appellant's liability as garnishees, and we are of the opinion that as Willis failed to execute the supersedeas bond suspending the judgment dismissing his petition at the time his appeal *was prosecuted the commissioners were authorized to pay the balance due Baker*

to him, and cannot again be held liable therefor. (Showalter v. Simmons, 5 Ky. Law Rep. 423; Frazier's Ex'ors v. Paige, 82 Ky. 73; Peek's Ex'or v. Peek's, 21 Ky. Law Rep. 15.)

This case seems identical in principle with the one here under consideration. The corporation is certainly not charged with any more burdensome duty as to the transfer of shares of stock than is a garnishee who is actually served with process for the purpose of requiring it to deliver the money or property of defendant in its hands to plaintiff or into court, but even in the case of a garnishee, where there is a judgment of the lower court denying the lien, the garnishee is justified in paying out the money.

It will be noted that the garnishee was not ordered by any judgment of any court to pay this money to Baker. Its sole justification was that it had a right to pay it to Baker because the court had adjudged that Willis had no lien on it.

Etheridge withdrew the money by *permission* of the court, not by *compulsion,* and paid it to his creditors who were not compelled by the judgment to receive it, and yet the judgment protected said creditors. (Fidelity Trust & Safety Vault Co. v. Louisville Banking Company, *supra.*)

Harding voluntarily released his wife from liability on the attachment bond, because under the judgment he had a right so to release her, not because he was compelled so to do. (Hey v. Harding, *supra.*)

Simonton, Trustee, paid out money to Hicks' creditors because he had the right to do it, the court having adjudged that the attaching creditors had no lien. The judgment did not compel Simonton or order him to make such payment, but furnished him a complete protection. (Maxwell v. Bank of New Richmond, *supra.*)

Small used 650 inches of water because he had that right under the court's judgment. He was not compelled to use any water. But the court's judgment furnished him a complete protection. (Porter v. Small, *supra.*)

The Board of Commissioners paid out the attached funds to Baker, because the attachment of Willis had been discharged. There was no judgment compelling the Board or ordering the Board to make this payment, but the judgment destroyed the lien claimed by Willis and furnished a complete protection to the Board. (Stephens, County Judge, v. Willis, *supra.*)

(5) AN INTERPLEADER PROCEEDING BY THE CORPORATION WOULD HAVE BEEN USELESS AS THE RESPECTIVE RIGHTS OF MACKENZIE AND ESCHMANN TO THE STOCK WERE RES ADJUDICATA WHEN THE CORPORATION TRANSFERRED SAME.

The transfer of the stock to McDowell and Mrs. Eschmann was made possible by Mackenzie's own negligence in failing to take any steps to stay pro-

ceedings upon the judgment of the Circuit Court and he cannot make the corporation pay any damages arising by reason of his own negligence.

When the certificate was presented to the corporation in February, 1915, and it was asked to transfer the stock, what was it to do? Mackenzie answers that the corporation should have filed a bill of interpleader making both Mackenzie and Eschmann parties, and requiring them to litigate their respective rights to the stock in question. In such a proceeding assume that Mackenzie set up his alleged lien on the stock. Eschmann would have responded by pleading the judgment of the Jefferson Circuit Court, which was in full force and effect and which held that Mackenzie had no such lien. That judgment would have been *res judicata* upon that issue.

No. 2 Ruling Case Law, page 117:

> "A writ of error does not, however, even when an appropriate bond is given, vacate or annul the judgment, nor is such the effect of statutory appeals in the nature of writs of error. Thus, though there are decisions to the contrary, the better rule seems to be that so long as the judgment remains unreversed, its conclusiveness as *res judicata*, as between the parties, is not affected, and it is still operative as a merger of the cause of action, *and a bar to its further prosecution.*"

That point has also been decided by this court.

Deposit Bank of Frankfort v. *Board of Council of Frankfort*, 191 U. S. 499, 48 L. Ed. 276.

"We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons, *or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force.*

"In the Crescent City, etc., v. Butchers' Union, etc., 120 U. S. 141, 30 L. Ed. 614, the question of what effect should be given to a decision of a court of the United States as proof of probable cause in a suit for a prosecution which was alleged to be malicious, was before the court. It appeared that the judgment relied upon had been subsequently reversed, and it was held that this made no difference unless it was shown that the judgment was obtained by means of fraud. Mr. Justice Matthews, delivering the opinion of the court, said:

" 'Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense, either by plea or in proof, as it would be in any other circumstances. *While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate, and even after reversal it still remains, as in the case of every* other judgment or decree in like circumstances, sufficient evidence in favor of the plaintiff who instituted the suit or action in which it is rendered, when sued for a malicious prosecution that he had probable cause for his proceeding.' "

So then we submit that a bill of interpleader would have been wholly ineffective. Would it be fair to hold that the corporation, a wholly disinterested party, must assume the burden and expense of instituting and prosecuting such litigation in order to protect Mackenzie from his own negligence? The execution of a supersedeas bond by Mackenzie, who was interested, would have been much simpler and less burdensome than the institution and prosecution of an interpleader proceeding by the corporation, which was not interested.

Another reason why the interpleader proceeding would have been ineffective is that Eschmann was only seeking to transfer the legal title to his stock and he had a perfect right to do that, as we will hereafter point out, even though it should be held that a lien then existed in favor of Mackenzie.

(6) ESCHMANN HAD THE RIGHT TO DEMAND THAT HIS STOCK BE TRANSFERRED EVEN THOUGH MACKENZIE HAD A LIEN THEREON.

At the time the transfer was made, even if it be assumed that Mackenzie's lien was good, Eschmann had the right to transfer the legal title. As we have pointed out, the corporation's act was not necessary to the transfer of the legal title and its transfer had no effect on the equities of other parties.

First National Bank of Lexington v. *Bowman*, 168 Ky. 433.

Rogers owned certain shares of stock in the Third National Bank of Lexington. This stock was pledged by Rogers to secure an indebtedness of his and the certificates were in the hands of the pledgees. Rogers executed an instrument transferring the title to Mrs. Bowman. The First National Bank sued Rogers and undertook to attach the stock.

Mrs. Bowman set up her claim to the legal title subject, of course, to the original claim of the pledgee, who had possession of the certificates, and the court sustained Mrs. Bowman's title, even though there was no delivery of the certificates, nor was the stock transferred upon the books of the company. The fact that the stock was pledged did not deprive the owner of the right to transfer the title.

It can scarcely be disputed that the holder of the legal title to property has a perfect right to transfer that legal title, even though there may be a lien on the property.

National City Bank of Chicago v. *Wagner*, C. C. A., 8th Circuit, 216 Fed. 473.

Certain shares of stock were pledged and the certificates endorsed and delivered to the pledgee. While so pledged the owner by an instrument, transferred her title to certain brokers and in this suit involving the rights of the original owner the original pledgee

and the brokers who were transferees, it was held that the transfer to these brokers carried the title, even though the certificates were not delivered nor the stock transferred on the corporate books.

(7) The Circuit Court of Appeals (p. 43) recognized the right of Eschmann to transfer his stock but said this:

> "It would seem that a court would have compelled the issue of a new certificate to Eschmann's nominees if that certificate should have had endorsed upon it a memorandum that it was subject to whatever lien Mackenzie might establish."

In other words, the corporation has been held liable in this case for what "might" happen in spite of the fact that thing has not happened in this case.

> "The wrong done to Mackenzie was therefore the issuing of the new certificate in such *a way that it might reach a bona fide purchaser and so perhaps cut off Mackenzie's lien,* but the wrong did not extend to the entire value of the stock since Mackenzie had therein no interest to be injured except to the extent of his lien."

We do not see how liability can be based on such a conclusion as that. The wrong is that the certificate is so issued that it "might reach a bona fide purchaser and so *perhaps* cut off Mackenzie's lien." The fact is that it has not been shown that the stock has reached the hands of a *bona fide* purchaser. According to plaintiff's contention in this case, it has not. A part of the stock went to V. H. Engelhard, whose

knowledge of the litigation was the only knowledge chargeable to the corporation and the other part went to Mrs. Eschmann, the wife of the defendant in the suit, *who still has it* (R., p. 17).

(8) HAD THE CORPORATION REFUSED TO MAKE THE TRANSFER UPON ESCHMANN'S DEMAND ON FEBRUARY 15, 1915, IT WOULD HAVE RENDERED ITSELF LIABLE IN DAMAGES. THE POSSIBILITY OF AN APPEAL FROM THE JUDGMENT DID NOT JUSTIFY REFUSAL OF THE CORPORATION TO ACT IN ACCORDANCE WITH SAID JUDGMENT.

American National Bank v. *Douglas,* Ark., 189 S. W. 161, L. R. A. N. S. 1917-B, 588.

The Coronado Coal Company sued a Miners Union for damages and attached funds belonging to the Union in the hands of the American National Bank. The petition of the Coronado was dismissed and the attachment was discharged, but the company notified the bank not to pay out the money belonging to the Miners' Union as it was the purpose of the coal company to appeal and to supersede the judgment. The Miners' Union drew a check for the amount of the deposit and presented it to the bank but the bank refused payment and undertook to justify its action by reason of the notice which had been given it that the Coronado Coal Company proposed to appeal the case. The Arkansas court held that the

bank was liable for refusing to treat this money as if no lien existed and for refusing to pay same upon the check of the Miners' Union, and that if the plaintiff, Coal Company, wanted to retain its lien, it was required to take some of the steps for that purpose which the law allowed. The court held that the bank was liable for refusing to pay the check under the circumstances. Had a supersedeas issued the bank would have been justified in refusing to pay the check (National Bank v. Johnson, 96 S. W. 433, Ky.). So in this case. If the corporation had declined to recognize the rights of Eschmann as owner of this stock, it would have been liable in damages to Eschmann for converting the stock.

This court will not penalize the disinterested corporation for its action when the whole loss, if any, was due to the failure of Mackenzie to act when it was his duty to act. (See opinion C. C. A., R. 42.)

(9) THE FAILURE OF ESCHMANN TO RECORD THE TRANSFER FROM HIMSELF TO HIS WIFE, AS REQUIRED BY THE KENTUCKY RECORDING STATUTE, FURNISHED THE CORPORATION NO EXCUSE FOR REFUSING TO MAKE THE TRANSFER.

It is claimed that the failure to record the transfer of the stock from Eschmann to his wife in some way makes the corporation liable. Section 2128 of the Kentucky Statutes so far as pertinent, reads as follows:

"A gift, transfer or assignment of personal property between husband and wife *shall not be valid as to third persons,* unless the same be in writing and be acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded."

(a) This statute is a part of an act of 1894. Prior to its passage it was the settled law of Kentucky that the phrase "personal property" or "personal estate" when used in a statute providing that a mortgage on personal estate, if recorded, was notice to all the world had no application to shares of stock or other intangible personal property.

U. S. Bank v. Huth, 4 B. Monroe, 423.

"Again the policy which dictated the statutes is not applicable to a chose in action or claim for a debt as there is no such visible possession of such claims or separation of the right in them from the apparent ownership which is calculated to deceive creditors and purchasers."

Spalding v. Paine's Administrator, No. 5 Ky. L. R. 391, 81 Ky. 416.

"These certificates of stock are in the pockets of the owner, and go with him where he may happen to locate as choses in action, or evidence of his right without any means on the part of those with whom he proposes to deal on the faith of such a security of ascertaining whether or not this stock is in pledge or mortgaged to others. He finds the name of the owner on the books of the company as subscriber of paid-up stock amounting to 180 shares, with the certificates in his possession; pays for these certificates their full value, and has the transfer to him made on

> the books of the company, thereby obtaining a perfect title. What other inquiry is he to make so as to make his investment certain and secure? Where is he to look in order to ascertain whether or not this stock has been mortgaged? The chief office of the company may be at one place today and at another tomorrow. The owner may have no fixed or permanent abode, and with his notes in one pocket and certificates of stock in the other, and the one evidencing the extent of his interest in the stock of the corporation, the other his right to money owing him by his debtor, we are asked that the mortgage is effectual as to the one and inoperative as to the other."

With the law in this condition the Legislature in 1894 passed the act in question using the phrase "personal estate" in a recording statute. It must be presumed, therefore, under familiar principles that in using the phrase "personal estate" the Legislature intended that it should have the meaning fixed definitely many years before by the Court of Appeals.

But it is said that Eberhardt v. Wahl, 124 Ky., holds that the statute does apply to the transfer of corporate stock. It it to be noted that the right of the transferee in that case was sustained on the ground of subrogation. True, the court seemed to assume that the statute applied. The opinion indicates no consideration of the cases just referred to or of the reasoning herein presented.

Furthermore, in several other cases the court has acknowledged that the question of the applicability of this statute to intangibles is an open question.

As late as November, 1923, in the case of Fogarty v. Neal, 201 Ky. 85, the court said:

> "For the purpose of this case it is unnecessary to inquire whether Section 2128, *supra*, applies to the transfer of a promissory note."

(b) It will be noted from the cases hereinafter referred to that the Court of Appeals of Kentucky has invariably sustained such transfers in the absence of fraud, in spite of non-compliance with this statute, and that in the last case decided by it construing this statute, the court refers to it as a *"statute dealing solely with the fraudulent transfer of property between husband and wife."* No fraud is charged in this case and certainly it is not charged that the corporation participated in or had knowledge of any fraud. The Court of Appeals holds that the statute had no effect unless the transfer was made in the State of Kentucky.

Fogarty v. Neal (*supra*):

> "For the purposes of this case it is unnecessary to inquire whether Section 2128, *supra*, applies to the transfer of a promissory note, or whether the payor of a note is a third person within the meaning of the statute. It may be conceded that the note is a Kentucky contract, and that its legal effect is to be determined by the law of negotiable instruments as applied in this State, but the question here presented is not the legal effect of the instrument, but the validity of the assignment. The section in question is not a part of the negotiable instrument law, but a separate and independent statute dealing solely

with the fraudulent transfer of personal property between husband and wife, and the question is: Does it govern the transaction here involved? Occasionally a question may arise as to whether the law of the domicile of the parties or of the place where the transfer is made, or of the place where the property is situated governs the fraudulent transfer of personal property. Hardaway v. Semmes, 38 Ala. 657; Ward v. Coon Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 71 A. S. R. 207; Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433; Schmidt v. Perkins, 74 N. J. L. 785, 67 Atl. 77, 122 A. S. R. 417, 11 L. R. A. (N. S.) 1007, and note; Gilkey v. Pollock, 82 Ala. 503; Boehme v. Rall, 51 N. J. Eq. 541, 26 Atl. 832. But no such question can arise in this case. At the time of the transfer here involved A. L. Neal and his wife were not only domiciled in Oklahoma, but the note itself was possessed, transferred and delivered in that State. *That being true, the law of Oklahoma controls and not the Kentucky statute, which has no extraterritorial effect.* Kurmer v. O'Neal, 39 West Va. 515, 20 S. E. 589; Willis v. Memphis Grocery Co. (Miss.), 19 So. 101; Fally v. Steinfield, 10 Ky. L. R. 982."

(c) THE TRANSFER FROM THE HUSBAND TO THE WIFE WAS VALID BETWEEN THE PARTIES THOUGH SAME WAS NOT IN WRITING NOR RECORDED AS REQUIRED BY THE STATUTE.

The transfer could only be questioned by creditors or purchasers. The corporation was not such a "third person" as could raise the question of its validity.

McWethy's Admr. v. *McCright*, 141 Ky. 816.

A decedent gave bonds to his wife, without recording the transfer. He died intestate and upon the settlement of his estate, his heirs claimed that the transfer was invalid as to them because not recorded. The Court of Appeals of Kentucky held that the transfer was valid between the husband and wife, and that no one but the purchaser or a creditor could question such a transfer, and in so holding the court said:

> "While in a sense the words 'third persons' will include all persons who are not parties to the contract or transaction; these words as used in the statute do not refer to or include a person, not a party to the transaction, who has no interest in the property given or conveyed, or does not sustain to the donor the relation of creditor or to the property that of an innocent purchaser, for persons without such interest or relationship could have no ground of complaint."

After referring to various Kentucky cases, the court distinctly held that the transfer as between the husband and the wife was valid.

> "It will be found from a careful examination of the opinions in these *two cases that they recognize the validity, as between husband and wife, of a gift of personal property from one to the other by word of mouth and manual delivery*, notwithstanding the provision of the statute which requires that in order to make such a gift valid as to third persons it must be in writing, duly acknowledged and recorded."

(d) A CORPORATION IS NOT LIABLE FOR REGISTERING A VOIDABLE TRANSFER.

Casey v. *Kastell*, 237 N. Y. 305, 142 N. E. 671, Court of Appeals of New York, January 15, 1924.

Plaintiff, an infant, delivered stock to her agent, which stock bore the endorsement of the infant. The agent caused the United States Steel Company, which had issued the stock, to transfer same. The infant thereupon repudiated the entire transaction, and the court held that the agent and the brokers who had sold the stock were liable, but the Court of Appeals reversed the decision of the lower court which had held the Steel Company liable for transferring the stock on the books.

> "The transfer being voidable only and legal and valid when made, the corporation had no right to refuse a transfer (Smith v. Railroad, 91 Tenn. 221, 239). It could have been compelled by the purchaser by recourse to the proper remedy to make it. (Travis v. Knox Terpezone Co., 215 N. Y. 259, 264.)
>
> "It follows that the judgment should be reversed as to the United States Steel Corporation and affirmed as to the individual defendants."

See also Smith v. Nashville D. R. Co., 18 S. W. 546.

(e) THE CORPORATION CANNOT INQUIRE INTO THE VALIDITY AS BETWEEN THE PARTIES OF A TRANSFER OF ITS STOCK. THE CORPORATION HAVING LAWFULLY TRANSFERRED THE STOCK IN 1915 WAS NOT LIABLE FOR REFUSAL TO RE-ISSUE SAME IN 1919.

Fletcher's Cyc. of Corporations, Vol. 6, page 6412:

> "Right to inquire into validity of transfer as between the parties. Ordinarily the corporation is not concerned with the consideration paid for a transfer of shares of its stock. And the assignee has the right to have the stock transferred on the corporate books irrespective of the inadequacy of the price he paid therefor or the fact that the stock was a gift, although the inadequacy of the consideration may be considered as a circumstance to support a contention that no actual sale occurred.
>
> "Nor, as a rule, can the corporation inquire into or pass upon the legality of the transaction by which its shares are transferred from one person to another, or justify a refusal to register the transfer on the ground that the consideration for the transfer was illegal."

The same thing is pointed out by other text books.

Machen on Corporations, Section 934:

> "Upon principle, where registration of a transfer is wrongfully refused, the transferee has substantially the same remedies as the transferer against the company, notwithstanding the fact that the very question at issue is his right to be deemed a member * * * that the transfer

was without consideration does not diminish the transferee's rights, nor is the illegality of the consideration any defense to the company.

"The fact that the transfer was executed in pursuance of an illegal gambling contract is no defense to the company when the objection has not been raised by the transferer."

We submit, therefore, that the non-compliance with this statute, whatever effect it may have on Mrs. Eschmann's rights, if she should be sued, can have no effect upon the liability of the corporation for making the transfer; because the corporation was not such a "third person" as had a right to take advantage of the statutory provision or as had a right to refuse to make the transfer because of the non-compliance with the said provision.

THIRD POINT.

Even if the Act of the Corporation in Transferring the Stock was Wrongful, no Liability Attaches, Because (A) no Loss is Shown to have been Suffered by Mackenzie, and (B) the Transfer on the Books was not Essential to the Transfer of Title, and such Transfer on the Books was not the Proximate Cause of any Loss Suffered by Mackenzie.

If it be conceded that the act of the corporation in transferring the stock was wrongful, still no liability can attach to the corporation for two reasons:

First, because no loss has been suffered by Eschmann; and

Second, because if any loss has been suffered, the act of the corporation in transferring the stock on its books was not the proximate cause of the loss.

MACKENZIE HAS SUFFERED NO LOSS.

It is not claimed by Mackenzie that this stock has by reason of the corporation's transfer come into the hands of a purchaser for value without notice of Mackenzie's rights. He claims, on the contrary, that McDowell and V. H. Engelhard and Mrs. Eschmann had full knowledge of the rights of Mackenzie, whatever those rights were, in view of the judgment of the Jefferson Circuit Court. Those original transferees still hold the stock (R. 17). He has proven his debt with Eschmann's administrators and, for all that appears in this record, he has collected same, or if not, there is no reason why he cannot collect same. Suppose, therefore, that he lost his lien on the stock. He still has a perfectly collectible debt. If his debt is collected, he has suffered no damage.

A TRANSFER ON THE CORPORATE BOOKS IS NOT ESSENTIAL TO A TRANSFER OF TITLE.

Second, the act of the corporation in transferring the stock is not the proximate cause of any loss, which Mackenzie may have suffered, because the transfer on the books of the corporation is not necessary for the transfer of title to corporate stock and the transferees have no better title after the corpora-

tion has transferred it than they had before the corporation transfers it.

It will be admitted, we assume, that the corporation is not liable unless its act in transferring the stock was the proximate cause of some loss.

Fletcher Cyc. of Corporations, page 6448:

> "And it must also appear that its act in recognizing the assignment and making the transfer operated to aid the breach of trust and contributed directly to the loss of the stock by the *cestui que trust.* In other words, the negligence of the corporation in making the transfer must be the efficient and proximate cause of such loss."

The transfer on the books did not aid the transfer of title.

Fletcher's Cyc. of Corporations, Vol. 6, page 6331, Section 3794:

> "Even where the charter or by-laws of a corporation or the general law under which it is organized provides that its stock shall be transferable only on the books, as between the parties, an unregistered transfer is valid."

The entry of the transfer on the books is not necessary for the translation of the title.

Husband v. *Linehan,* 168 Ky. 304, 181 S. W. 1089, Annotated Cases, 1917-D, 954.
Stowe v. *Harvey,* 241 U. S. 199, 60 L. Ed. 952.
Thurber v. *Crump,* 86 Ky. 408.

The Court, in passing on this question, and in discussing the statute which requires the registration of the transfer on the corporation's books, said:

"This provision was certainly made for the protection of the corporation and purchasers, but not for the protection of the creditors of the stockholders. It is but right that a company should know at all times who its stockholders are; their right to vote, their right to draw dividends; their right to shape and control the destiny of the company in the prosperity and welfare of which each member has a direct interest."

That a complete and perfect title may be procured by an endorsement and delivery of the certificate without registering the transfer on the books is pointed out in this language:

"By this section Wilson was not denied the right to transfer his stock in the company. By the common law, his stock being personal property, he had the right to sell it at private sale and pass a perfect legal title to it, which sale, upon delivery of the stock itself, if susceptible of manual delivery, if not, upon the delivery of the certificates—a symbolical delivery—would pass the legal title to the vendee, which title would prevail against any prior lien upon the stock or executory contract for the sale of it, of which the vendee had no notice, which sale would also prevail against any subsequent sale or transfer of the same stock. So far, therefore, as the statute treats the transfer of stock, as between the vendor and vendee, as valid it is simply declaratory of a common-law principle. This common-law principle is unrestrictive of the right of the owner of stock to sell it at private sale and pass a perfect legal title to it. James Wilson was the legal owner of the stock; the absolute legal title was in him; when he sold it to the appellant, he

parted with all the title that he had; he had the legal title and he sold that title; there was nothing left for him to do concerning the transfer. All the title that he had vested in his vendee. It is well settled that when a person makes an absolute sale of property, to which he has a legal title, the legal title passes to the vendee, subject, however, to such restrictions as our registration laws may put upon such transactions for the protection of innocent purchasers, etc."

It will not do to say that the vendees did not give a valid consideration or that they had knowledge of the circumstances. These observations might be pertinent in a suit against them, but as between them and the transferer title certainly passed. If a transaction is subject to be set aside, it cannot be done by the corporation which had no interest, nor can the corporation be made liable for a wrong of other parties. It follows, we think, clearly, that the act of the corporation in transferring the stock on its books bore no relation whatever to any injury that may have been suffered by Mackenzie.

THE TRANSFER ON THE CORPORATE BOOKS IS NOT THE PROXIMATE CAUSE OF ANY LOSS MACKENZIE MAY HAVE SUFFERED.

Smith v. *Nashville D. R. Company,* 91 (Tenn.) 221, 18 S. W. 546; Lurton, J.

The testator, Baugh, devised certain stock in defendant corporation, or one-fifth thereof to his daughter, Fannie Baugh, for life with remainder

over. The certificate was issued to Fannie without qualification as to her interest being limited.

Subsequently, Fannie Baugh married Smith and Smith becoming her trustee, procured possession of the certificate standing in her name. Smith, as trustee, and Fannie Baugh, assigned the certificate to Rizon, a dummy, and on the same day he assigned the same certificate to Clarke, Dodge & Company and that company assigned same to Newcomb, who turned in the original certificate issued to Fannie Baugh and caused a new certificate to be issued in his name. Smith, trustee, got the proceeds and squandered them. The action sought to hold the corporation liable for the loss, without making the fraudulent trustee or his sureties or Newcomb, the holder of the stock, parties.

The court held that the transfer was as effectually made by the endorsement of the certificate and the delivery thereof to Newcomb as it was made after the certificate was turned in by Newcomb and the new certificate issued to him. Title passed without a transfer on the books, and therefore the transfer on the corporate books was not the proximate cause of the damage.

> "If a corporation transfer shares upon a forged assignment and power of attorney, or upon the authority of one wrongly assuming to be the agent of the owner, or upon a void decree or judgment, its act would be a nullity, in so far as it was thereby sought to affect the rights or status of the true owner as a shareholder. Such

owner would remain a shareholder, regardless of the illegal cancellation of the evidence of his right, and notwithstanding the issuance of a new certificate to the transferee in place of that canceled. This right would be no more affected by the taking up of his certificate without valid authority than it would be by its accidental destruction. A court of equity would compel the corporation, in either case, to recognize him as a shareholder, by the issuance of a new certificate, and compel an accounting for dividends wrongly paid over to the transferee. Telegraph Co. v. Davenport, 97 U. S. 369; St. Romes v. Cotton-Press Co., 127 U. S. 614, 8 Sup. Ct. Rep. 1335; Dewing v. Perdicaries, 96 U. S. 193; Pollock v. Bank, 7 N. Y. 274; Loring v. Salisbury Mills, 125 Mass. 138; Brown v. Insurance Co., 42 Md. 384; Hambleton v. Railroad Co., 44 Md. 551."

The Telegraph Co. case and the St. Romes case so much relied on by the Circuit Court of Appeals, wholly overlooks the distinction pointed out by Judge Lurton in the next sentence:

> *"But when the assignment of shares is made by the person appearing on its books to be the absolute owner, but the assignment was in breach of trust, then the liability of the corporation to the cestui que trust for transferring such shares depends, not only upon its being shown that the corporation had either actual or constructive notice of the breach of trust, but upon its further appearing that its act in recognizing the assignment and making the transfer operated to aid the breach of trust, and contributed directly to the loss of the stock by the cestui que trust.* If it be assumed that the facts known to the corporation at the time of its transfer of these shares to Newcomb were sufficient to put it upon in-

quiry as to the terms upon which this stock was held, and as to the power of the assignees to make sale, and the purposes of such sale, then it should be held justly liable for the injurious consequences to the *cestui que trust* of its act, under such circumstances, in making the transfer to the purchaser. *But, if its transfer to him did not affect the rights and interests of the cestui que trust by reason of the fact* that the purchaser had acquired a good and undefeasible title before such transfer, then it would not be just to hold that it had aided in a breach of trust already irremediable. The rule on this subject has been well stated by Mr. Lowell in his recent and most valuable work upon Transfer of Stocks. 'The liability of the corporation,' says Mr. Lowell at Section 153, 'for recording a transfer made in breach of trust, depends very much upon the position of the purchaser. If he has acquired, before transfer on the books, a perfect title to the stock, free from all claims on the part of the *cestui que trust,* the breach of trust is complete before the corporation is asked to transfer; and when it records the transfer the corporation is merely doing what it is bound to do, and is not helping the trustee to commit the breach of trust. The corporation can therefore incur no liability to the *cestui que trust* by recording a transfer to a *bona-fide* purchaser for value, unless there is a regulation making the stock transferable only on the books, *and unless that regulation can be so construed that the act of the corporation is necessary to pass the legal title.*' To same effect, see Sections 99, 100, 138, 149, 150.

"The negligence of the corporation in permitting the transfer must be the efficient and proximate cause of the loss sustained by the *cestui que trust.* If the purchaser's title was complete without the transfer, then it cannot be the efficient, proximate cause of the loss. Such a

purchaser could compel a transfer to himself, and it would be the grossest injustice to hold the corporation responsible."

"The title of the purchaser upon the assignment of the certificate was complete without registration or transfer on stock books of the corporation. The rule requiring transfer on the books of the company by the well-settled line of decisions in this State, and by the great weight of authority in the courts of America, is a rule made solely for the benefit of the company. By it the company is enabled to know who are entitled to vote, and to whom it may pay dividends. *A complete equitable and legal title passes by the act of the owner in assigning the certificate, and the subsequent registration of this assignment and issuance of a new certificate in no way affected the rights of the cestui que trust.*"

Therefore, we repeat, even if it be held that the transfer was illegal, no damage has followed from the wrongful act, first, because no damage at all has been suffered, and, second, because if any damage has been suffered, the action of the corporation in transferring the stock was not the proximate cause thereof.

(4) THE CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT IT WAS BOUND BY THE DECISIONS OF THIS COURT TO HOLD THE TRANSFER ON THE CORPORATE BOOKS TO BE THE PROXIMATE CAUSE OF LOSS TO MACKENZIE. ESCHMANN, BEING THE OWNER, HAD A RIGHT TO DEMAND AND ENFORCE THE TRANSFER OF HIS STOCK ON FEBRUARY 20, 1915, IN SPITE OF ANY LIEN MACKENZIE MAY HAVE HAD.

We argued to the Circuit Court of Appeals that the act of the corporation in transferring the stock was not the proximate cause of the loss to plaintiff, if any. The court thought the argument "persuasive"; but a "majority of the court" held that it was bound to hold to the contrary by the decisions of this court in *Telegraph Company* v. *Davenport,* 97 U. S. 369, and *St. Romes* v. *Cotton Press Co.,* 127 U. S. 614.

We think the court entirely misapplied those decisions. In the St. Rome's case a person procured possession of the widow St. Rome's certificates and the corporation, without any authority from the widow St. Romes, transferred the shares to other parties. The same thing was done in the Davenport case by means of a forgery of the owner's name to a power of attorney.

In those cases persons, admittedly the true owners, sued the corporation for dividends on the stock. The corporation undertook to defend upon the

ground that it had transferred the stock to third persons. The true owners replied that those transfers being made without their authority, could not affect their rights as stockholders. The true owners were not concerned with what title, if any, the transferees took, as against the corporation.

The distinction between the liability of a corporation for making a transfer without authority from the true owner, and its liability for making such transfer pursuant to the direction of the true owner, but in violation of some equitable rights of third persons was aptly pointed out by Judge Lurton in the case of *Smith* v. *Nashville, Etc., R. R. Co., supra.* He referred to the Davenport and St. Romes cases and other cases and stated that where shares had been reissued by the corporation without the authority of the true owner, the rights of the true owner were no more affected than they would be by an accidental destruction of the certificates. He then pointed out that where the transfer was made pursuant to the authority of the true owner, but in violation of some equitable right of the third person, that third person, as a condition precedent to recovering anything from the corporation, must establish two things: first, that the corporation acted with knowledge of his equitable rights, and, second, that the act of the corporation in making the transfer contributed to or caused the loss of those rights:

> "But when the assignment of shares is made by the person appearing on its books to be the

absolute owner, but the assignment was in breach of trust, then the liability of the corporation to the *cestui que trust* for transferring such shares depends, not only upon its being shown that the corporation had either actual or constructive notice of the breach of trust, but upon its further appearing *that its act in recognizing the assignment and making the transfer operated to aid the breach of trust, and contributed directly to the loss of the stock by the cestui que trust.*"

"The corporation can therefore incur no liability to the *cestui que trust* by recording a transfer to a *bona-fide* purchaser for value, unless there is a regulation making the stock transferable only on the books, *and unless that regulation can be so construed that the act of the corporation is necessary to pass the legal title.*" To same effect, see sections 99, 100, 138, 149, 150.

"The negligence of the corporation in permitting the transfer must be the efficient and proximate cause of the loss sustained by the *cestui que trust. If the purchaser's title was complete without the transfer, then it cannot be the efficient, proximate cause of the loss.* Such a purchaser could compel a transfer to himself, and it would be the grossest injustice to hold the corporation responsible."

We have pointed out that the transfer on the corporate books, being unnecessary for the translation of title, did not give the purchasers any better title than they would have had had there been no transfer on the books.

It seems clear, therefore, that the loss, if any, suffered by Mackenzie is not traceable to the act of the corporation.

FOURTH POINT.

Refusal of Corporation to Transfer Stock to Mackenzie After His Alleged Purchase at the Judicial Sale.

Eschmann caused the stock to be transferred on the books of the company to McDowell and Mrs. Eschmann on February 20, 1915 (R. 17), and in April, thereafter, Mackenzie appealed the case (R. 18); the judgment was reversed by the Court of Appeals of Kentucky in March, 1917 (R. 18); a final judgment was entered in the Jefferson Circuit Court ordering a sale of the stock on October 31, 1917 (R. 18); the alleged sale was had on July 15, 1918 (R. 19); the Commissioner's report of sale was confirmed October 30, 1918; and the bill of sale issued to Mackenzie by the Commissioner December 7, 1918 (R. 20). Mackenzie demanded the stock April 29, 1919 (R. 19).

1. Obviously if the corporation acted lawfully when it transferred the stock to McDowell and Mrs. Eschmann, it could not be liable for refusing to do an impossible thing, that is, to issue the stock to Mackenzie four years thereafter. However, it is said that the judgment of court adjudging a lien on this stock in favor of Mackenzie and confirming the sale to Mackenzie is *res judicata;* and that the Engelhard Company cannot now question that judgment. Engelhard Company was *not a party* to the litigation when the judgments relied on were entered and had

not been for something like six years. The judgment, therefore, cannot be said to be *res judicata* as to A. Engelhard & Sons Company.

2. THE JUDGMENT OF SALE IS NOT *RES ADJUDICATA* AS TO A. ENGELHARD & SONS COMPANY, WHICH WAS NOT A PARTY TO THE LITIGATION.

> "A decree has no legal efficacy against persons not party or privy to the suit in which it was pronounced."

McAllister v. *Bridges,* 19 Ky. Law Rep. 107:

> "It has been even held that none are bound by a judgment unless the record shows that they were parties or privies to the same. The fact that one was active in sustaining a claim or contention does not make him a party."

And again:

> "Appellant was not a party to that suit, and it is an obvious principle of justice that no man ought to be bound by a proceeding to which he is a stranger."

Everidge v. *Martin,* 175 S. W. 1004, 164 Ky. 497:

> "A judgment of a court does not bind any person except such persons as are parties to the suit or their privies, and they in no wise bind a party who is not before the court."

Without citation of further authorities we submit that neither the judgment adjudging a lien to Mackenzie nor the order confirming a sale nor any

other order entered in that case is *res judicata* in so far as Engelhard & Sons Company is concerned.

3. The situation is not affected at all by reason of the fact that Mrs. Eschmann, as administratrix, was a party to that suit, because a judgment in an action to which an administratrix is a party is not binding in a subsequent action where that same person is individually a party.

Troxell v. *Delaware, Etc., R. R. Co.*, 227 U. S. 433, 57 L. Ed. 586.
23 Cyc. 1244.

4. MACKENZIE'S TITLE TO THE STOCK AS PURCHASER HAS NOT BEEN ADJUDGED. HE TOOK ONLY THE TITLE WHICH ESCHMANN HAD AND THAT WAS NO TITLE.

Nor can Mackenzie claim that his title is adjudged by reason of his purchase at the judicial sale for a purchaser at a judicial sale takes only the title of the person whose title is therein adjudged to be sold. Only Eschmann's title was adjudged to be sold and he had no title at the time of the judgment of sale as we have heretofore pointed out.

16 R. C. L., page 136:

> "However, it may be stated as a broad rule that a purchaser at a judicial sale takes by virtue of his purchase all the right, title and interest of the parties to the proceedings in and to the property conveyed to him, *and no more*.

16 R. C. L., page 138:

"A judicial sale carries only the interest estate and rights in the premises that the parties to the proceedings had and could have asserted, no more and no less. The purchaser succeeds to their rights and attitude in respect of the property sold, 'takes their shoes,' stands in their place, acquires their interest as it existed in their hands, subject to all infirmities of title then attaching to the estate, and to all equities, known or secret, which operated as a limitation upon the nominal or apparent estate which they had."

Beale v. *Stroud*, 191 Ky. 755, 231 S. W. 522:

"Perhaps one of the oldest principles applicable to a judicial sale, and which has been uniformly adhered to in this jurisdiction, is that there is no warranty of the title of lands sold under a judgment of court by the owner or any party to the action, and the doctrine of *caveat emptor* applies with full vigor to such a sale. The purchaser must beware of what he purchases at such a sale."

16 Ruling Case Law, page 119:

"86. CAVEAT EMPTOR.—There are many cases holding generally that in judicial sales the rule of caveat emptor applies in its utmost vigor and strictness. The court sells, and can undertake to sell, only the right, title, interest and property, such as it is, of the parties to the proceeding and the purchaser is charged with knowledge of that fact. It therefore follows that he takes upon himself the risk of finding outstanding rights that could have been asserted against the parties to the proceedings; and if by reason

of the existence of such rights, whether known or not, or discoverable or not, he takes less than a complete title to the entire property offered, or even takes nothing at all, by his purchase, he cannot complain and has no defense upon being sued for the purchase price.

The Engelhard Company is not then bound by the judgment or the sale thereunder and is free to show that that judgment and sale did not result in vesting title in Mackenzie. Of course, if the points heretofore made are sustained, it does not matter about the proceedings under this judgment, but if those points should be not sustained, nevertheless it is true that Mackenzie acquired no title to the stock for the following reasons:

(a) The court had lost jurisdiction over the stock in question and its attempt to adjudge a lien thereon was void.

(b) The attempted judicial sale was void because a court cannot sell property not in its possession, and

(c) Neither the judgment nor bill of sale described the stock with sufficient accuracy to effectuate a sale of the particular stock in question.

(5) BY VOLUNTARILY RELINQUISHING POSSESSION OF THE CERTIFICATE MACKENZIE LOST HIS LIEN THEREON.

When the judgment was entered, which ordered the certificate of stock to be delivered to the defendant, Eschmann, the plaintiff, Mackenzie, failed to supersede the judgment and therefore, by his volun-

tary act he lost or surrendered possession of the pledged certificate. It is familiar law that the voluntary relinquishment of the possession of the thing pledged destroys the lien.

Jones on Pledges and Collateral Securities, 2nd Ed., Par. 40:

> "It is a well settled principle that a delivery back of the possession of the thing pledged, terminates the pledgees' title, unless such re-delivery be for a temporary purpose only, or be to the pledgor in a new character such as special bailee or agent."

Harding v. *Eldridge,* 186 Mass. 39

> "It is uniformly held that by a contract of pledge only a special title passes to the pledgee which depends upon actual possession, while the general right of property remains in the pledgor, and in order to hold and transfer his lien there must be not only a physical delivery where the chattel can be thus transferred, *but continued possession also retained."*

So in *Story on Bailment,* 6th Ed., Sec. 287, the author says:

> "In the case of a pledge of personal property, the right of a pledgee is not consummated except by possession; and ordinarily when that possession is relinquished, the right of the pledgee is extinguished or waived."

31 Cyc. 817:

> "Since the lien of the pledgee is dependent upon his possession of the pledged property his

abandonment of the property or his voluntary relinquishment of its possession to the pledgor * * * constitutes a waiver of his lien."

Pomeroy Equity Jurisprudence, 2nd Ed., Sec. 1233:

> "It is the very essence of this condition that while the lien continues the possession of the thing remains with the debtor or the person who holds the proprietary interest subject to the encumbrance. The equitable lien differs essentially from the common law lien, which is simply a right to retain possession of the chattel until some debt or demand due to the person thus retaining is satisfied; and possession is such an inseparable element, that if be voluntarily surrendered by the creditor, the lien is at once extinguished."

(6) THE ATTEMPTED SALE OF THE CHATTEL NOT IN THE COURT'S POSSESSION WAS INEFFECTIVE TO CONVEY TITLE.

Neither the court nor the officer which undertook to make the sale had possession of the thing to be sold, nor did any party to the litigation have possession of the thing to be sold. The corporation itself was not before the court. Therefore, the attempted sale was void.

No. 16 Ruling Case Law, page 49:

> "Personal property sold at a judicial sale is generally required to be present at the place of sale, and subject to the inspection of all who attend."

Note 14, Am. Decisions, at page 323:

> "The decided preponderance of authorities is in favor of the proposition that if the property is not present at the sale, such sale will be void."

We are not presented with the question as to whether the sale would have been valid had the corporation, which in a sense has possession of its stock, been a party. It was not a party.

(7) THE ORDER OF SALE AND BILL OF SALE DID NOT DESCRIBE THE THING SOLD SUFFICIENTLY TO EFFECT A VALID SALE.

Neither the judgment nor the bill of sale described the sale with sufficient accuracy to effectuate a sale of any particular stock. It is familiar law that the thing to be sold must be specifically described.

16 Ruling Case Law, 23.

> "One of the characteristics of a judicial sale is that it acts upon specifically described property."

The judgment in this case and the bill of sale described the thing sold as follows:

> "3. The plaintiff, Louis B. Mackenzie, has a lien upon certificate No. 24 of the capital stock of A. Engelhard & Sons Company, a corporation for 130 shares of the capital stock in said company and upon any certificate or certificates which have been, or may hereafter be, issued by

> A. Engelhard & Sons Company to the defendants, Edgar A. Eschmann and Bettina E. Eschmann, executors of the estate of F. W. R. Eschmann, deceased, in lieu of said certificate No. 24, and has a lien upon said 130 shares of stock represented by said certificate, said lien being to secure the plaintiff in the payment of the debt evidenced hereby and his costs herein" (R. 29).

Certainly certificate 24 could not be sold under that judgment because it did not exist and the only other thing that the judgment purported to order sold was:

> "Any certificate or certificates which have been or may hereafter be issued by A. Engelhard & Sons Company to Edgar A. Eschmann and Bettina E. Eschmann, executors of the estate of F. W. R. Eschmann, deceased."

The court will bear in mind now that they could not sell certificate 24 and they only undertook to sell such certificate as had been issued to the *executors*. No certificate had been issued to the executors and no stock was owned by the executors. No certificate had been issued to the executors and no stock was owned by the executors. Therefore, the court did not undertake to sell anything that had any existence.

The purchasers at the judicial sale took nothing, because nothing was sold. Nothing existed that met the description contained in the order of sale and in the bill of sale.

FIFTH POINT.

A Court of Equity will not Enforce Rights Claimed Under a Judgment Unless it be Shown that the Enforcement of Such Rights would Produce Equity. No Such Showing Can be Made Here.

Even if it be held that no point heretofore made in this brief is sustainable, yet a court of equity would not enforce the claims of Mackenzie in this case, because to do so would work injustice and be inequitable.

The facts are that Mackenzie started out with a claim against Eschmann on a promissory note, which note was procured from Eschmann by gross fraud, of which Mackenzie was cognizant (Record, 21) but which fraud did not support a defense at law, because Eschmann's son had condoned the fraud (Record, 27).

By reason of Mackenzie's own failure without excuse to supersede the judgment the corporation was led to act thereon, and to make the transfer complained of.

A studied attempt to excite the sympathy of the court on behalf of Mackenzie is made, based on the charge, directly or inferentially asserted all the way through the brief for Mackenzie, that Engelhard, McDowell and Eschmann formed a conspiracy to transfer this stock so as to defeat the collection of any judgment that Mackenzie might procure. This is a peculiar case in which to make such a charge or to

intimate that an effort was made to conceal the facts. All of the facts were voluntarily stipulated by the parties. Those facts show that the parties acted in good faith and in reliance on what they believe to be their rights. Now that the principal actors, Engelhard, Eschmann and McDowell, are all dead, it is a simple thing, but we submit an unfair thing, to undertake to prejudice the court's mind by insinuations of fraud.

Furthermore, the corporation, which is the only defendant here, certainly was not a participant in any fraud, it had no chance to profit, and its innocent stockholders are not to be condemned because counsel conceives that there was a fraudulent motive in the minds of the individual actors in the transaction. If there was fraud, the transfers resulting therefrom could only be set aside in a direct suit against the transferees.

The same may be said as to the repeated charge made that Mrs. Eschmann gave no consideration for the transfer to her. The corporation does not know what consideration she gave; the stipulated facts do not indicate that she gave no consideration, and if she did give no consideration, the transfer was merely voidable. The charge of a lack of consideration is wholly improper in this case.

Mackenzie has lost nothing at all unless it be the credit of $100.00 on his judgment which he bid for the stock. He wants to mulct the corporation in damages and still collect his debt from the Eschmann estate.

He asserts that however inequitable his claim might be or whatever hardship its enforcement might work upon the corporation, that nevertheless his rights are *res judicata,* by reason of the order confirming his alleged purchase at the judicial sale. It is said that for this court to refuse to sustain the rights claimed to have been thus acquired, would be an unjustifiable rebuke to the Jefferson Circuit Court.

The answer to this is that the Jefferson Circuit Court has never had an opportunity to consider the rights of the corporation or of the transferees of this stock. Counsel well knew that the Jefferson Circuit Court would never sustain so inequitable a claim as is here presented, and he therefore brought his suit in the Federal Court in the hope that that court, in its anxiety to treat the State court's judgment with respect, might grant him some relief.

The Circuit Court of Appeals in the case at bar recognized that the present situation was created through the fault of Mackenzie:

> "The surrender and reissue of the certificate did not occur under circumstances which made the act wrongful as against Mackenzie in the manner and degree to which such an act is ordinarily wrongful as against the true owner. On the contrary, while Mackenzie *did not directly acquiesce in the withdrawal of the certificates, he contributed to create the situation attending the withdrawal, surrender and reissue.* To obtain a supersedeas would apparently have been no burden and would have avoided all later complications."

The Circuit Court of Appeals further held that it would be grossly inequitable to sustain Mackenzie's claim as asserted:

> "In this situation the parties came to the foreclosure sale of the stock. Its value was $17,000.00; the lien was about $10,000.00. It was quite evident that no sale could be had at which any fair value could be realized. No counsel would undertake to advise with certainty what title would pass. The books of the corporation showed no interest to sell. No stranger would pay a substantial price, because he would be buying only a law suit. Eschmann and his vendees would not bid, because they were advised and doubtless in good faith believed that no title would pass. The actual result was inevitable, viz., that Mackenzie would buy in the $17,000.00 of stock for a nominal price (he paid $100) and still leave his whole claim against Eschmann for the debt practically unimpaired. *This would be and was a grossly inequitable result. The situation could have been easily clarified, and it was Mackenzie's duty to procure that clarification before going to sale, if he expected to seek the aid of a court of equity in enforcing his rights as purchaser.* An appropriate proceeding could have been taken in the equity court where the case was pending, and probably as ancillary or supplemental to that case, whereby it would have been adjudicated, as between Mackenzie, the corporation, Eschmann and the purchasers *pendente lite,* just what title would pass by the expected sale. After such an adjudication the sale would have been fair to all concerned and all suitable equitable enforcement remedies could have been asked without embarrassment."

The Circuit Court of Appeals also recognized the rule that under such circumstances a court of equity was not bound by the rule as to *res judicata* to enforce a judgment when to do so would work an injustice.

> "The rule which shapes the relief given by a court of equity in circumstances where equitable considerations make that relief contingent upon plaintiff's acceptance of less than full legal rights, must vary in its application with every case. We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules."

We think the court's statement of the circumstances was quite accurate, but that it made an application of these rules which was wholly unjustified. It says in substance that the situation was created by the fault of Mackenzie. Unquestionably the corporation has not profited and could not profit in any way. To adjudge Mackenzie entitled to the relief prayed would be a gross injustice, says the court, but following this reasoning the court says that Mackenzie must have a part of the relief prayed, and that the corporation must pay to Mackenzie his debt, interest and costs, though that debt is a valid obligation of the Eschmann estate, and there appears to be no obstacle whatever to the collection of that debt. If there is any such obstacle, nothing that the corporation has done has created that obstacle.

The Circuit Court of Appeals further held that it would be grossly inequitable to sustain Mackenzie's claim as asserted:

> "In this situation the parties came to the foreclosure sale of the stock. Its value was $17,000.00; the lien was about $10,000.00. It was quite evident that no sale could be had at which any fair value could be realized. No counsel would undertake to advise with certainty what title would pass. The books of the corporation showed no interest to sell. No stranger would pay a substantial price, because he would be buying only a law suit. Eschmann and his vendees would not bid, because they were advised and doubtless in good faith believed that no title would pass. The actual result was inevitable, viz., that Mackenzie would buy in the $17,000.00 of stock for a nominal price (he paid $100) and still leave his whole claim against Eschmann for the debt practically unimpaired. *This would be and was a grossly inequitable result. The situation could have been easily clarified, and it was Mackenzie's duty to procure that clarification before going to sale, if he expected to seek the aid of a court of equity in enforcing his rights as purchaser.* An appropriate proceeding could have been taken in the equity court where the case was pending, and probably as ancillary or supplemental to that case, whereby it would have been adjudicated, as between Mackenzie, the corporation, Eschmann and the purchasers *pendente lite,* just what title would pass by the expected sale. After such an adjudication the sale would have been fair to all concerned and all suitable equitable enforcement remedies could have been asked without embarrassment."

The Circuit Court of Appeals also recognized the rule that under such circumstances a court of equity was not bound by the rule as to *res judicata* to enforce a judgment when to do so would work an injustice.

> "The rule which shapes the relief given by a court of equity in circumstances where equitable considerations make that relief contingent upon plaintiff's acceptance of less than full legal rights, must vary in its application with every case. We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules."

We think the court's statement of the circumstances was quite accurate, but that it made an application of these rules which was wholly unjustified. It says in substance that the situation was created by the fault of Mackenzie. Unquestionably the corporation has not profited and could not profit in any way. To adjudge Mackenzie entitled to the relief prayed would be a gross injustice, says the court, but following this reasoning the court says that Mackenzie must have a part of the relief prayed, and that the corporation must pay to Mackenzie his debt, interest and costs, though that debt is a valid obligation of the Eschmann estate, and there appears to be no obstacle whatever to the collection of that debt. If there is any such obstacle, nothing that the corporation has done has created that obstacle.

Counsel profess to be much alarmed at the rule that a court of equity will not use its equitable powers to enforce an unjust claim, even though based upon a judgment. However, this is a familiar rule of general application.

In 23 Cyc., page 1432, where the text treats of applications to the Chancery Court to enforce rights claimed under a judgment, this appears:

> "The complainant must of course show himself equitably entitled to the relief which he asks, and his petition will be defeated by anything showing that it would be unjust or unfair to grant it."

This court has more than once declined to enforce a judgment, even though an entirely valid judgment, and even though it was sought to be enforced against parties who were admittedly bound by it. A court of chancery will decline to enforce such a judgment, where its enforcement is inequitable, upon the same grounds that a court of chancery will decline to enforce a perfectly legal and valid contract where its enforcement would be inequitable and would produce a hardship.

Lawrence Manufacturing Company v. *Janesville Cotton Mills,* 138 U. S. 552, 34 L. Ed. 1005.

The Lawrence Co. sued the Janesville Co. to enjoin the use by the defendant company of the letters "LL" upon certain cotton sheetings. A decree permanently enjoining the defendant company from using such letters on cotton sheeting was rendered.

Thereafter, after a reorganization, the Janesville Cotton Mills resumed the use of the letters "LL" in connection with the sale of cotton sheeting. The Lawrence Company brought suit to enjoin the reorganized Janesville Company from using these letters, and the court held that the reorganized company was bound by the former decree but it further held that the original judgment enjoining the Janesville Cotton Manufacturing Company from the use of the letters "LL" was erroneous and should never have been entered, and it declined, therefore, to enjoin the reorganized company from using the letters, because it said that to do so would be unjust.

We quote from this court's opinion:

> "But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill. Hence, even if it be assumed upon the evidence that the decree against the old corporation bound the new one, yet this being in effect, in one of the two aspects, and, perhaps, the sole aspect, in which it is framed, a bill to carry the former consent decree into execution, the Circuit Court was not obliged to do so if it believed that decree erroneous; and that it was erroneous we have already decided. Inasmuch as plaintiff came into a court of equity to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief. Mitf. Ch. Pl. 96. Indeed, it would seem to have devolved upon it to show that the decree was a right decree. Such is the language of Lord Redesdale in *Hamilton* v. *Houghton,* 2 Bligh,

P. C. 169, 193, and of Lord Chancellor Sugden in *O'Connell* v. *MacNamara*, 3 Drew & W. 411, 412. The same principle was announced as early as 1700 by the lord keeper in *Johnson* v. *Northey*, Finch Prec. in Ch. 134. See also *Lawrence* v. *Berney*, 2 Ch. Rep. 127, Adams, Eq. 416, 2 Dan. Ch. Pr. (4th Ed.) 1586. This rule was much considered and applied in *Wadhams* v. *Gay*, 73 Ill. 415, and approved by this court in *Gay* v. *Parpart*, 106 U. S. 679 (27: 256)."

Gay v. *Parpart*, 106 U. S. 679, 27 L. Ed. 257.

"We do not regard that it militates with the doctrine of the conclusive effect of what is *res judicata*, that where there is an incomplete decree, and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection, so as to render the decree effective, then it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances, *for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose.*

"And upon an appeal to equity by original bill to lend its assistance for carrying it into execution because of an omission in the decree in providing any means of its execution, *it would seem reasonable that the same rule of the court's action should obtain as in case of any solemn agreement under seal; and where there are manifest the elements of injustice, mistake, surprise, misapprehension, and want of consideration, to remain passive.*"

Washams v. Gay, 73 Ill. 414.

This is the rule recognized, but we submit misapplied, by the Circuit Court of Appeals in the case at

bar. If Mackenzie could show, first, that he had been deprived of the means of collecting his original debt, and second, that he had been so deprived by the action of the corporation, and third that the corporation was not justified in making the transfer in reliance on the judgment, there might be some ground to contend that a court of equity should lend him its aid. In this case, he wants to punish the corporation which acted in good faith and in reliance on the judgment of the court; and he wants to gain for himself a net profit of more than $30,000.00, though there is no equity in his claim.

Counsel is alarmed at the conflict which would result between Federal and State courts should this court decline to exercise its equitable powers to enforce an inequitable claim based upon a State court judgment.

Hassall v. *Wilcox,* 130 U. S. 493, 32 L. Ed. 1001.

A statute of Texas provided that laborers on railroads should have a lien upon the railroads superior to all other liens.

Wilcox sued the railroad in a State court and procured a judgment which recited that it constituted a lien on the railroad prior and superior to all other liens. Later an action was instituted in the Federal Court by the holder of a mortgage, and Wilcox set up his judgment lien and asked its enforcement. The court held that the mortgagee was not a party to the State court proceeding, just as the Engelhard Company was not a party to the proceeding here, and

upon looking behind the State court judgment, it was found that the claims upon which the judgment was based did not constitute a lien under the statute, and therefore the claim was disallowed as a lien, though the State court judgment provided that it was a lien.

In the case of Gay v. Parpart (*supra*) the Federal court refused its aid in enforcing rights acquired under a State court partition proceeding, because the enforcement of those rights would be unjust.

Even if it be so nominated in the bond a court of equity will not decree the delivery of the pound of flesh, or if it does will accompany the decree with conditions rendering its enforcement impossible.

We respectfully submit that the case should be remanded to the District Court with directions to dismiss the petition.

J. Verser Conner,
Percy N. Booth,
Counsel for A. Engelhard & Sons Co.

MACKENZIE *v.* A. ENGELHARD & SONS COMPANY.

A. ENGELHARD & SONS COMPANY *v.* MACKENZIE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 55 and 59. Argued October 9, 1924.—Decided November 17, 1924.

1. An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of. P. 142.
2. Where the owner of corporate shares, the unendorsed certificate for which was held by another as collateral to a note, at first prevailed in a suit brought by the latter in a Kentucky court to enforce the note and the lien, and, under permission of the judgment, withdrew the stock certificate, filed as an exhibit, and procured the shares to be transferred by the corporation to others, *held:*

(a) That a final judgment, entered after a reversal, sustaining the plaintiff's claim, ordering that the shares be publicly sold, and confirming a sale so made to the plaintiff, was binding, with respect to his ownership so acquired, upon the assignees of the shares, who so took them pending the appeal, although the plaintiff had obtained no supersedeas of the original judgment, and, owing to the tactics pursued by his opponents, had bought them in at far less than their true value. P. 143.

(*b*) That Kentucky Civ. Code § 747, providing that "an appeal shall not stay proceedings on the judgment unless a supersedeas be issued," was inapplicable. P. 143.

(*c*) That the plaintiff's rights, under the state judgment, to have the shares with accrued dividends or their value was absolute as against the corporation, (which allowed the transfer with notice of the suit,) and were not diminished in equity by his failure to procure the supersedeas, or to pursue the assignees of the stock, (since he was not bound to do either,) nor by the low price he paid for the shares. *Id.*

286 Fed. 813, reversed.

CERTIORARI, on petitions of both sides, to review a decree of the Circuit Court of Appeals which modified a decree for the plaintiff, Mackenzie, in his suit to compel the defendant corporation to deliver to him a certificate for shares of its stock, or to pay him their value, and for an accounting of all dividends declared since his purchase of the shares at a judicial sale.

Mr. William Marshall Bullitt, with whom *Mr. Samuel B. King* was on the brief, for Mackenzie.

Mackenzie became the full legal owner of the 130 shares of stock, as purchaser at a valid judicial sale, duly confirmed by the state court.

The court could adjudge a lien on the shares of stock without retaining the physical custody of the certificate itself, which it had erroneously surrendered to Eschmann under the original judgment. When that judgment was reversed, and Eschmann's executors were decreed to return the certificate to the court, their failure could not affect the power of the court to adjudge a lien upon the stock to secure the payment of the note on which it was pledged. *Sprague* v. *Cocheco Mfg. Co.*, Fed. Cas. No. 13,249.

The stock stands in the name of the original transferees and no rights of *bona fide* purchasers for value, without notice, have arisen.

Neither the judgment, order of sale, nor order of confirmation, was ever appealed from, and they cannot be collaterally attacked here.

Whether (*a*) a lien could be created by pledging a certificate of stock without endorsing it in blank, or (*b*) the compulsory surrender of the possession of the pledged thing under order of court destroys the lien, or (*c*) a court's commissioner must have physical possession of the thing sold at the time of the sale, or (*d*) corporate stock could be sold and a bill of sale made therefor without having the mere evidence thereof in the shape of the stock certificate present—were all matters which, whether decided rightly or wrongly, could only affect the correctness of the judgment and not its validity.

Any rights acquired by Eschmann, or by his wife or attorney through him, under the lower state court original decree, were subject to be divested by a reversal.

The Engelhard Company's act in transferring the stock pending the appeal was voluntary,—not done under or pursuant to the judgment.

Putting to one side cases of purchasers under judicial sales (where for reasons of public policy judicial sales are protected even in the event of reversal, 96 Am. St. Rep. 136, note), the law is well settled that even if a *bona fide* purchase, for value, is made after an appeal is taken, the purchaser's title remains subject to the final decision of the appellate court; and hence his title is lost if that results in a reversal. *Kirkland* v. *Trott*, 75 Ala. 321; *Real Estate Sav. Co.* v. *Collonious*, 63 Mo. 290; *Carr* v. *Cates*, 96 Mo. 271; *Dunnington* v. *Elston*, 101 Ind. 373; *Debell* v. *Foxworthy*, 9 B. Mon. 228; *Clark* v. *Farrow*, 10 B. Mon. 446; *Clarey* v. *Marshall*, 4 Dana, 95; *Martin* v. *Kennedy*, 83 Ky. 335; *Cook* v. *French*, 96 Mich. 525; *Lord* v. *Hawkins*, 39 Minn. 73; *Smith* v. *Burns*, 72 Miss. 966; *Harle* v. *Langdon*, 60 Tex. 555.

An appeal is a mere continuation of the original suit, so that the *lis pendens* established by the suit continues until the expiration of the time for appeal; or, in the event of appeal, until the final disposition of the case by the appellate court. *Golden* v. *Riverside Coal Co.*, 184 Ky. 200; *Webb* v. *Webb's Guardian*, 178 Ky. 152. *Fidelity Trust Co.* v. *Louisville Banking Co.*, 119 Ky. 675; *Langley* v. *Warner*, 3 N. Y. 327; *Bank of United States* v. *Bank of Washington*, 6 Pet. 19; and *Fidelity Mutual Life Ins. Co.* v. *Clark*, 203 U. S. 64, distinguished.

The basis of the decision in the *Fidelity Trust Co. Case* was the difference between money and property, as is shown by *Webb* v. *Webb's Guardian, supra*, and *Golden* v. *Riverside Coal Co., supra*. See also, *Phelps* v. *Elliott*, 35 Fed. 455.

A creditor receiving payment out of money lawfully in the plaintiff's hands, occupies a very different position from a corporation which chooses to transfer corporate stock upon its books at the request of an ostensible owner, with full knowledge that another person is claiming title thereto.

Having procured the ruling dismissing it as a party, the Engelhard Company is now estopped from claiming that it should have been a party to the suit or that Mackenzie should have pursued some other course. *Doniphan* v. *Gill*, 1 B. Mon. 199; *Taylor* v. *Cook*, 136 Ala. 354; *Kelly* v. *Norwich Co.*, 82 Ia. 137.

Mackenzie, having acquired title to the stock, was entitled to demand a transfer thereof on the company's books, and when it refused he could maintain an action, in equity, to compel a transfer of the stock to him and an accounting for dividends paid since he became the owner. *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614; 14 Corpus Juris, 757, § 1158; *Cushman* v. *Thayer Mfg. Co.*, 76 N. Y. 365; *Mundt* v. *Commercial Natl. Bank*, 136 Am. St. Rep. 1023, and monographic note, pp. 1030,

1035, 1039; *Citizens Natl. Bank* v. *State*, 45 L. R. A. (N. S.) 1075, and elaborate note, pp. 1080–1082. See also *Leurey* v. *Bank*, Ann. Cas. 1913 E, pp. 1174–1176, note and cases there cited; 4 Pomeroy's Eq. Jur., 3d ed., § 1412, note.

The law in Kentucky is to the same effect. *Bank of Kentucky* v. *Winn*, 110 Ky. 140; see also *Ramage* v. *Gould*, 176 Cal. 746.

To a suit of that kind, the corporation is the only necessary party; and third persons claiming to hold certificates for the same stock are not necessary parties. *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614; *Skinner* v. *Fort Wayne R. Co.*, 58 Fed. 55.

When a corporation knows that there are rival claimants to a certificate of stock, which controversy is in litigation, it acts at its peril in deciding between them; and if the corporation "guesses wrong" as to which will ultimately have the better title, it is responsible to the rightful owner. 1 Machen's Modern Law of Corporations, § 935; *Miller* v. *Doran*, 245 Ill. 200.

The company could have protected itself—either by interpleader or refusal to transfer the stock until the appeal was decided, or by demanding a bond of indemnity. See note to *O'Neil* v. *Wolcott Mining Co.*, 174 Fed. 527; 27 L. R. A. (N. S.) 200, 201; *Mundt* v. *Commercial Natl. Bank*, *supra*, p. 1030, note 1; 7 R. C. L. 268.

If a corporation issue new certificates to one not the true owner thereof, the owner can maintain a suit in equity against the corporation to compel the issuance of new certificates to him, or, in the alternative, to recover the value of his stock. *Black* v. *Zacharie & Co.*, 3 How. 483; *Telegraph Co.* v. *Davenport*, 97 U. S. 369; *Moores* v. *Citizens' Natl. Bank*, 111 U. S. 156; *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614.

The Circuit Court of Appeals erred in limiting Mackenzie's recovery to his original $7,500 debt and interest.

It, in effect, denied the full faith and credit to the state court judgment, which by statute it is required to accord. Rev. Stats., § 905; *Cooper* v. *Newell*, 173 U. S. 555; *Yazoo & Mississippi Valley R. R. Co.* v. *Clarksdale*, 257 U. S. 10.

A federal court, in equity, is not entitled to decide a case according to its individual ideas of what the result should be, but it is bound by the fixed principles of jurisprudence, one of which is that it must give to the judgment of a state court, having personal jurisdiction of the parties, the same effect as to the rights arising therefrom, as would be accorded by the judgment in the State where rendered. *Cooper* v. *Newell*, 173 U. S. 555.

The Circuit Court of Appeals misconceived the nature of the equitable principle invoked by it to justify its disregard of Mackenzie's legal title to the stock and its award of damages measured by a lien that had ceased to exist. *Magniac* v. *Thomson*, 15 How. 281; *Betzler* v. *James*, 227 Mo. 375. See also *Old Colony Trust Co.* v. *Medfield Street Ry. Co.*, 215 Mass. 156; *York* v. *Trigg*, 87 Okla. 214; *Osborn* v. *United States Bank*, 9 Wheat. 738.

Mr. J. Verser Conner, with whom *Mr. Percy N. Booth* was on the brief, for A. Engelhard & Sons Company.

The first judgment decreed that Mackenzie had no cause of action against Eschmann and no lien on the stock, and directed that the certificate be delivered to Eschmann. More than two months thereafter, Eschmann withdrew the certificate from court, and more than three and one-half months thereafter presented the certificate to the corporation and demanded its transfer. Is the corporation liable for making such transfer? If it is, its liability is, of course, wholly dependent upon its knowledge of the litigation between Mackenzie and Eschmann.

Section 747 of the Civil Code of Kentucky: "An appeal shall not stay proceedings on the judgment unless a supersedeas be issued."

The transferees who took while the first judgment was in effect, took a good title. *Fidelity Trust Co.* v. *Louisville Banking Co.*, 119 Ky. 675; *Bank of United States* v. *Bank of Washington*, 6 Pet. 19.

Admitting that the transferees knew of the litigation, the fact is that they took title at a time when the title of Eschmann to the stock was free from encumbrance by virtue of the judgment of the Jefferson Circuit Court. The notice, therefore, that Mackenzie might appeal and get that judgment reversed could not be made to take the place of a supersedeas bond. When the case was reversed and the new judgment entered, Mackenzie acquired a perfectly valid right as against Eschmann, but no right as against Eschmann's transferees.

A more recent decision of this Court illustrates the same principle. *Fidelity Mutual Life Ins. Co.* v. *Clarke*, 203 U. S. 64; *Langley* v. *Warner*, 3 N. Y. 327; *Wood's Administrator* v. *Nelson's Administrator*, 9 B. Mon. 600.

"Whatever is lawfully done under the judgment before the supersedeas takes effect is valid and must stand." 37 Cyc. 602; 2 R. C. L., pp. 273, 291.

Consequently Mackenzie was bound by the judgment of the court permitting Eschmann to withdraw the stock and his alleged lien was lost thereby. His only chance to save it was to supersede that judgment. *Hey* v. *Harding*, 25 Ky. L. Rep. 1454; *Garrett* v. *Jensen*, 44 Cal. App. 99. See *Maxwell* v. *Bank of New Richmond*, 101 Wis. 286; *Stephens* v. *Willis*, 21 Ky. L. Rep. 170. *Clarey* v. *Marshall*, 4 Dana, 95; *Golden* v. *Riverside Coal Co.*, 184 Ky. 200; *Webb* v. *Webb's Guardian*, 178 Ky. 152; *Miller* v. *Doran*, 245 Ill. 200, distinguished. Cf. *Ure* v. *Ure*, 223 Ill. 454; *Chicago & N. W. Ry. Co.* v. *Garrett*, 239 Ill. 297.

The corporation which was not a party to the litigation in the lower court cannot be held liable for a tort in doing an act which, when done, was justified by a subsisting judgment. *Bridges* v. *McAlister*, 106 Ky. 791.

One who acts in a manner justified by a subsisting and unsuperseded judgment is protected, even though the act is not done by compulsion of the judgment. *Porter* v. *Small*, 62 Oreg. 574; *Hall* v. *Smith-McKenney Co.*, 162 Ky. 159; *Stephens* v. *Willis*, 21 Ky. L. Rep. 170.

An interpleader proceeding by the corporation would have been useless, as the respective rights of Mackenzie and Eschmann to the stock were *res judicata* when the corporation transferred it. *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

Eschmann had the right to demand that his stock be transferred even though Mackenzie had a lien thereon. *First Natl. Bank* v. *Bowman*, 168 Ky. 433; *National City Bank* v. *Wagner*, 216 Fed. 473.

Had the corporation refused to transfer upon Eschmann's demand, it would have rendered itself liable in damages. The possibility of an appeal from the judgment did not justify refusal of the corporation to act in accordance with the judgment. *American Natl. Bank* v. *Douglas*, 126 Ark. 7.

A corporation is not liable for registering a voidable transfer. *Casey* v. *Kastell*, 237 N. Y. 305.

The corporation cannot inquire into the validity, as between the parties, of a transfer of its stock. Having lawfully transferred the stock in 1915, it was not liable for refusal to reissue it in 1919. 6 Fletcher's Cyc. of Corporations, p. 6412; Machen, Corporations, § 934.

Even if the transfer was wrongful, no liability attaches, because (*a*) no loss is shown to have been suffered by Mackenzie, and (*b*) the transfer on the books was not essential to the transfer of title, and such transfer on the

books was not the proximate cause of any loss suffered by Mackenzie. *Smith* v. *Railroad*, 91 Tenn. 221.

The Circuit Court of Appeals erred in deciding that it was bound by the decisions of this Court to hold the transfer on the corporate books to be the proximate cause of loss to Mackenzie. Eschmann, being the owner, had a right to demand and enforce the transfer of his stock on February 20, 1915, in spite of any lien of Mackenzie's. *Telegraph Co.* v. *Davenport*, 97 U. S. 369; *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, distinguished.

The distinction between the liability of a corporation for making a transfer without authority from the true owner, and its liability for making such transfer pursuant to the direction of the true owner but in violation of some equitable rights of third persons, was aptly pointed out by Judge Lurton. *Smith* v. *Railroad*, 91 Tenn. 221.

As for the refusal of the corporation to transfer the stock to Mackenzie after his alleged purchase at the judicial sale, obviously, if the corporation acted lawfully when it transferred the stock to Eschmann's assignees, it could not be liable for refusing to do an impossible thing, that is, to issue the stock to Mackenzie four years thereafter. Engelhard Company was not a party to the litigation when the judgment relied on was entered and had not been for something like six years. The judgment, therefore, cannot bind the company as *res judicata*. *McCallister* v. *Bridges*, 19 Ky. L. Rep. 107; *Everidge* v. *Martin*, 164 Ky. 497.

Mackenzie's title to the stock as purchaser has not been adjudged. He took only the title which Eschmann had, and that was no title. *Beale* v. *Stroud*, 191 Ky. 755.

By voluntarily relinquishing possession of the certificate through his failure to supersede the judgment, Mackenzie lost his lien.

The attempted sale of the chattel not in the court's possession, (the corporation not being a party) was ineffective to convey title.

The order of sale and bill of sale did not describe the thing sold sufficiently to effect a valid sale.

A court of equity will not enforce rights claimed under a judgment unless it be shown that the enforcement of such rights would produce equity. 23 Cyc. p. 1432; *Lawrence Mfg. Co.* v. *Janesville Cotton Mills*, 138 U. S. 552; *Gay* v. *Parpart*, 106 U. S. 679; *Wadhams* v. *Gay*, 73 Ill. 415.

This is the rule recognized, but we submit misapplied, by the Circuit Court of Appeals in the case at bar. If Mackenzie could show, first, that he had been deprived of the means of collecting his original debt, and second, that he had been so deprived by the action of the corporation, and third, that the corporation was not justified in making the transfer in reliance on the judgment, there might be some ground to contend that a court of equity should lend him its aid. In this case, he wants to punish the corporation which acted in good faith and in reliance on the judgment of the court; and he wants to gain for himself a net profit of more than $30,000, though there is no equity in his claim.

A federal court should decline to exercise its equitable powers to enforce an inequitable claim based upon a state court judgment. *Hassall* v. *Wilcox*, 130 U. S. 493; *Gay* v. *Parpart, supra.*

The case should be remanded to the District Court with directions to dismiss the petition.

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill brought by Mackenzie to compel the defendant corporation, A. Engelhard & Sons Company, to deliver to the plaintiff one hundred and thirty shares of

stock formerly represented by certificate numbered 24, to the defendant, or to pay to him the value of the same, and the amount of all dividends declared upon the shares since July 15, 1918. The grounds are these.

The plaintiff, being holder of a note for $7,500 and of the above mentioned certificate then standing in the name of F. W. R. Eschmann and unendorsed but stated in the note to be security, brought a suit against Eschmann, and others, makers of the note, and the corporation, in the Jefferson Circuit Court of Kentucky, to recover upon the note, to have it declared a lien upon the said stock and to have the lien enforced. He filed the certificate as an exhibit. The corporation was dismissed from the suit upon its demurrer, but of course had notice thereafter that the suit was pending and that the plaintiff claimed an interest in the stock. Indeed, the plaintiff had previously sought to have the certificate that he held transferred to him as pledgee but had been refused. On November 7, 1914, judgment was rendered for the defendants and it was further adjudged that the defendant F. W. R. Eschmann be "permitted" to withdraw the certificate from the exhibits, leaving a copy in the record. The plaintiff prayed an appeal but did not obtain a supersedeas, as he might have by giving a bond.

Eschmann withdrew the certificate and on February 20, 1915, obtained in place of it new certificates to his wife and his attorney. On April 26, 1915, the plaintiff perfected his appeal to the Court of Appeals of Kentucky. On March 6, 1917, the Court of Appeals reversed the judgment below, 174 Ky. 450; and on October 31, 1917, final judgment was entered in the Jefferson Circuit Court that the plaintiff should recover the sum demanded and that he had a lien upon certificate No. 24, and the shares represented by it and upon any certificates that might have been issued by the corporation to the defendants,

then the executors of F. W. R. Eschmann, deceased, in lieu of No. 24, to secure the plaintiff in the payment of the debt and costs. It was adjudged further that the shares should be sold and that the defendants should return the certificate to the Court. On July 15, 1918, a sale was had, but the attorney for the defendants, who also is attorney for the corporation, attended and gave notice that the certificate had been sold by Eschmann and had been canceled. The plaintiff bought for one hundred dollars and on October 30, 1918, the sale was confirmed by the Court. Subsequently he demanded a certificate from the corporation but was refused. All its stock had been issued.

In the present case the District Court decreed that the plaintiff recover his original debt and interest, with a dividend declared after the purchase by the plaintiff, in all $13,354.75, with interest from the date of the decree until paid. Both parties appealed to the Circuit Court of Appeals. That Court, while agreeing that the plaintiff was entitled to relief against the corporation, held that as the plaintiff had not obtained a supersedeas to the first judgment in the former suit and had taken no proceedings before the sale to establish what title would pass by it, his relief in equity should be limited to the amount of the debt, interest and costs in the other suit up to the time of sale, although the plaintiff's right was absolute at law. 286 Fed. 813. Writs of certiorari were issued on the petitions of both sides. [262 U. S. 739.]

It does not seem to us to need argument to establish that the sale to the plaintiff was effectual as against the parties to the suit. The decree confirming the sale was final and not appealed from. We believe the rule in Kentucky to be that purchasers *pendente lite* would stand in the defendant's shoes. An appeal is a proceeding in the original cause and the suit is pending until the

appeal is disposed of. Therefore, apart from more special considerations applicable here but not needing mention, the assignees of the stock stood no better than Eschmann unless they were helped by the provision that "an appeal shall not stay proceedings on the judgment unless a supersedeas be issued" in the Kentucky Civil Code. § 747. But there was no question here of any proceedings on the judgment. When the final judgment was reached it determined the rights of Eschmann *ab initio*, and it seems to us impossible to believe that it did not also determine the rights of the assignees. We understand that this would be the view of the Kentucky Court of Appeals. *Golden* v. *Riverside Coal & Timber Co.*, 184 Ky. 200, 205.

The liability of the corporation rightly was found to exist by both Courts below. The company might be liable even without fault, and if for any reason it were unable to restore the stock it might be answerable for its value. *Telegraph Co.* v. *Davenport*, 97 U. S. 369, 372. *Moores* v. *Citizens' National Bank*, 111 U. S. 156, 166. But here, as we have said, it had notice of the suit. It knew that the first judgment might be reversed, as it was, upon appeal, and was entitled to protect itself, as it might have and for all that appears may have done, when it issued the new certificates. We perceive no reason in the Kentucky Civil Code for distinguishing between its position and that of the assignees.

We come then to the question whether equity requires any diminution of the rights acquired by the plaintiff under the judicial sale to him. It is adjudged that his rights are absolute. It is a strong thing to cut down his rights under the judgment of the State Court. The parties stood upon equal ground. Without going further into the facts each seems to have been trying to get the better of the other and neither can get much help from atmospheric considerations. The plaintiff did not care

to assume the liabilities of a supersedeas bond, but if the defendant took no steps to protect itself it might have done so. The plaintiff was not bound to pursue the assignees of the stock before looking to the corporation. *St. Romes* v. *Levee Steam Cotton Press Co.*, 127 U. S. 614, 620. It is immaterial what were the limits of the plaintiff's original interest; he comes before this Court as absolutely entitled to the stock and the preliminaries to his acquiring the title have no bearing on the case. He got it at a better bargain than he would have done had his adversaries taken a different course, but he got it and his right is not to be impugned. See *Miller* v. *Doran*, 245 Ill. 200.

Decree reversed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE SANFORD dissent.